117-228

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1221.

ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. HOYT, ET AL., APPELLANTS,

vs.

THE WINONA AND ST. PETER RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED NOVEMBER 20, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

ritory or State, whether such lands were lands in place or indemnity lands. The word "granted" has here the broad rather than the narrow signification.

(3.) As it is conceded that within the overlapping limits of the W. & St. P. R. R. Co. and the Minnesota Central R. R. Co. neither company received anything like its quota — coterminous lands, the proper reduction can be determined by ascertaining the amount of lands within those limits which had theretofore passed to the Minnesota Central Railroad Company under the act of 1857.

5 (4.) The case will therefore be referred to the two masters heretofore appointed to report the number of acres which had, prior to March 3rd, 1865, passed to the Minnesota Central Railroad Company within fifteen miles of its line and between the six and twenty mile limits of the Winona and St. Peter R. R. Co.'s line, and this amount will be the amount of reduction.

(5.) Further, in order that if the construction we have placed upon the decision of the Supreme Court be incorrect it may have all the needful data before it to make the proper reduction, the masters will also report separately the amounts of land which had, prior to March 3rd, 1865, passed to the Minnesota Central Railroad Co. within the following limits:

(*a.*) The amount within fifteen miles of the Minnesota Central line and within the fifteen and twenty mile limits of the Winona and St. Peter line.

(*b.*) The amount within six miles of the Minnesota Central line and within the six and ten mile limits of the Winona and St. Peter line.

(*c.*) The amount within the six and fifteen mile limits of both lines.

(*d.*) The amount within the six and fifteen mile limits of the Minnesota Central line and within the fifteen and twenty mile limits of the Winona and St. Peter line.

6 And afterwards, to wit, on the 17th day of September, 1885, the following order settling decision of Supreme Court and notice of appeal was entered of record in T. M., "F," page 770, in the words and figures following, viz:

Order Settling Decree and Notice of Appeal.

United States Circuit Court for the District of Minnesota. Term Minutes, June Term, A. D. 1885.

ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. HOYT, SAMUEL N. HOYT, William G. Fargo, M. Barney, Charles S. Barney, Angus Smith, and Benjamin P. Cheney, Complainants,

vs.

THE WINONA AND ST. PETER RAILROAD COMPANY, Defendant.

Defendant's motion to settle the decree of the Supreme Court herein having been heretofore fully argued by the solicitors for the respective parties, duly submitted, and by the court taken under ad-

visement, now the court, after due consideration thereof, and being fully advised concerning the same, it is ordered—

1st. That this cause be, and the same is hereby, referred to the two masters heretofore appointed to report the number of acres which had, prior to March 3rd, 1865, passed to the Minnesota Central Railroad Company within fifteen miles of its line and between the six and twenty mile limits of the Winona and St. Peter Railroad Company's line; and this will be the amount of reduction.

2nd. That said masters do report separately the amounts
7 of land which had, prior to March 3rd, 1865, passed to the Minnesota Central Railroad Company within the following limits, to wit: (1) The amount within fifteen miles of the Minnesota Central line within the fifteen and twenty mile limits of the Winona and St. Peter line. (2) The amount within six miles of the Minnesota Central line and within the six and ten mile limits of the Winona and St. Peter line. (3) The amount within the six and fifteen mile limits of both lines. (4) The amount within the six and fifteen mile limits of the Minnesota Central line and within the fifteen and twenty mile limits of the Winona and St. Peter line.

Thereupon Gordon E. Cole, Esq., complainants' solicitor, notices an appeal to the Supreme Court of the United States.

8 United States Circuit Court, District of Minnesota.

A. H. BARNEY *et al. vs.* WINONA AND ST. PETER RAILROAD COMPANY.

The undersigned, special masters, appointed by the court at the June term, 1879, and to whom this cause was again at this term of court referred to inquire and state certain facts supplemental to the findings of fact heretofore reported to the court by the special masters at the June term, 1880, and the December term, 1880, respectfully report that they have made the inquiry and find—

First. The number of acres which had passed prior to March 3rd, 1865, to the Minnesota Central Railroad Company within fifteen miles of its line, and between the six and twenty mile limits of the Winona and St. Peter Railroad Company's line is 66,987 and $\frac{19}{100}$.

Second. The number of acres which had, prior to March 3rd, 1865, passed to the Minnesota Central Railroad Company within the following limits, as follows:

(*a*) The amount within fifteen miles of the Minnesota Central line and between the fifteen and twenty mile limits of the Winona and St. Peter is 23,398 and $\frac{50}{100}$ acres, of which 6,399 and $\frac{81}{100}$ acres are in the six (6) mile or granted limits of the Minnesota Central Co., and 16,998 and $\frac{69}{100}$ acres are between the six (6) and fifteen (15) mile or indemnity limits of the Minnesota Central Railroad Company.

9 (*b*) The amount within six (6) miles of the Minnesota Central line and between the six and ten mile limits of the Winona and St. Peter Railroad Company is 15,000 and $\frac{45}{100}$ acres; the prior finding being erroneous.

(*c*) The amount between the 6 and 15 mile limits of both roads is 17,658 and 6 & $\frac{1}{2}$-100 acres, of which 9,144 and 11 $\frac{1}{2}$-100 acres are

between the six and ten mile limits of the Winona and St. Peter Railroad Company and between the six and fifteen mile limits of the Minnesota Central Company, and 8,513 and 95 and $\frac{1}{2}$-100 acres are between the ten and fifteen mile limits of the Winona and St. Peter Railroad Company.

(*d*) The amount between the six and fifteen mile limits of the Minnesota Central railroad and between the fifteen and twenty mile limits of the Winona and St. Peter railroad is 16,998 and $\frac{69}{100}$ acres.

(*e*) The amount within six miles of the Minnesota Central line and between the ten and fifteen mile limits of the Winona and St. Peter railroad is 10,930 and $\frac{17}{100}$ acres.

That the plaintiffs are entitled to a conveyance of all the lands embraced and described in the decree of this court entered at the December term, 1880, except 66,987 and $\frac{19}{100}$ acres, a correct description of which lands so excepted is contained in the schedule marked Exhibit "A," but excepting from said conveyance all lands used for the track of said railroad, to wit:

A strip of land, across each of said lands crossed by said railroad, fifty (50) feet in width on each side of the center line of the
10 main track of the Winona and St. Peter railroad, as said railroad is now located and constructed; and any greater width, not exceeding one hundred feet in width on each side of said center line, where necessary, permanently to include all cuts, embankments, and ditches and other works of said company, when necessary to secure and protect its main line of railroad and all depot grounds at the several stations, and lands used for other purposes necessary and incident to the operation of said railroad, the same to be described by metes and bounds or other suitable descriptions, and included in the exception to the grant of any section in which any of said lands are situated.

CHARLES E. SIMMONS,
H. W. LAMBERTON,
Special Masters.

(Here follows diagram marked p. 11.)

12 EXHIBIT "A"

Parts of section.	Sec.	Township.	Range.	Acres.	Remarks.
Und. $\frac{1}{2}$ n $\frac{1}{2}$	5	106	36	157.59	
W. $\frac{1}{2}$	5	107	36	316.72	
All	7	------	----	634.08	
N $\frac{1}{2}$ n w $\frac{1}{4}$, und. $\frac{1}{2}$ s $\frac{1}{2}$ of n w $\frac{1}{4}$ & und. $\frac{1}{2}$ s w $\frac{1}{4}$	17	------	----	200	
Und. $\frac{1}{2}$ all	19	------	----	320.72	
" w $\frac{1}{2}$	29	------	----	160	
" all	31	------	----	318.13$\frac{1}{2}$	
" all	7	108	36	606.40	

Exhibit A—Continued.

Parts of section.	Sec.	T'p.	Range.	Acres.	Remarks.
[illegible] w ¼ and n ½ of s w ¼	17			240	
[illegible]ll	19			605.44	
[illegible] ½	29			320	
[illegible]ll	31			621.12	
w ¼	5	109	36	160	
[illegible]ll	7			639.63	
[illegible] ½	17			320	
w ¼ & n w ¼ of s w ¼	19			199.33	
½ of n w ¼ & s w ¼	29			240	
[illegible]ll	31			639.81	
[illegible]ll	5	110	36	661.83	
[illegible]ll	7			642.98	
[illegible]ll	19			636.25	
[illegible] ½	29			320	
[illegible]	31			640.63	
w ¼ of n w ¼, s ½ of n w ¼, & s ¼	5	111	36	277.03	
[illegible]	7			644.23	
½	17			320	
[illegible]	19			637.44	
½	29			320	
[illegible]	31			631.59	
nd. ¼ n ½	1	106	37	155.68	
½ of n e ¼, s ½ of n w ¼, & s ½ of s e ¼	2			240	
nd. ½ fr. w ½, und. ½ e ½ of n e ¼, and und. ½ s w ¼ of n e ¼	3			147.28	
½ of n e ¼	4			80	
nd. ½ all	5			307.68	
" e ½	7			160	
				13,521.59½	
				13,521.59½	
All	1	107	37	643.24	
[illegible]	3			640.17	
[illegible]	5			637.61	
½	7			320	
½ of n w ¼	8			80	
[illegible]	9			640	
[illegible]	11			640	
of n e ¼ & n ½ of n w ¼	13			160	
[illegible]. ½ s ½, und. ½ s ½ of n e ¼ nd und. ½ s ½ of n w ¼	"			240	

Exhibit A—Continued.

Parts of section.	Sec.	T'p.	Range.	Acres.	Remarks.
E ½, n w ¼, n ½ of s w ¼ & s w ¼ of s w ¼	15	------	----	600	
E ½, n w ¼, e ½ of s w ¼ & n w ¼ of s w ¼	17	------	----	600	
All	19	------	----	619.75	
"	21	------	----	640	
N ½ of n e ¼	22	------	----	80	
All	23	------	----	640	
"	25	------	----	640	
"	27	------	----	640	
N ½ of n w ¼ & s e ¼ of n w ¼	28	------	----	120	
N ½ of n e ¼, s w ¼ of n e ¼, n w ¼ & s ½	29	------	----	600	
N ½ of n e ¼	30	------	----	80	
All	31	------	----	646.75	
"	33	------	----	640	
"	35	------	----	640	
W ½	19	112	39	292.22	
W ½ of n e ¼, s e ¼ & w ½	29	------	----	560	
All	31	------	----	622.56	
W ½ of n e ¼, s e ¼ & w ½	33	------	----	560	
				66,985.54½	

16 United States Circuit Court, District of Minnesota. Term Minutes, June Term, A. D. 1885. October 6th, 1885.

ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. HOYT, SAMUEL N. HOYT, WILLIAM G. FARGO, M. BARNEY, CHARLES S. BARNEY, ANGUS SMITH, and BENJAMIN P. CHENEY

vs.

THE WINONA AND ST. PETER RAILROAD COMPANY.

The original decree in this action, entered at the December term of this court, 1880, to wit, on the 13th day of April, 1881, having been modified on appeal to the Supreme Court of the United States, and the mandate of said court having been filed in the office of the clerk of this court, whereby said original decree is ordered to be modified in accordance with the decision of said Supreme Court; and this court, after hearing the respective parties, having ordered the case to be referred to the masters heretofore appointed, to report the number of acres which had, prior to March 3rd, 1865, passed to the Minnesota Central railroad within fifteen miles of its line and between the six and twenty mile limits of the Winona and St. Peter

Railroad Company's line, and that this amount will be the amount of reduction, to which order or interlocutory decree reference is hereby made for greater certainty; and said masters having made their report, whereby they find and report the number of acres which had passed prior to March 3rd, 1865, to the Minnesota Central Railroad Company within fifteen miles of its line, and between the six and twenty mile limits of
17 the Winona and St. Peter Railroad Company's line is sixty-six thousand and nine hundred and eighty-seven and nineteen hundredths acres: Now, therefore, it is ordered and decreed that the defendant specifically perform the contract in suit, and do convey forthwith to the plaintiffs, or such persons as a majority of them may appoint, in addition to those already conveyed, the lands in said original decree and the list and description subjoined thereto specifically described, being one hundred and ninety-seven thousand one hundred and eleven acres and sixty-one and one-half one-hundredths of an acre, except sixty-six thousand nine hundred and eighty-seven and nineteen-hundredths of an acre; a correct description of which lands so excepted by sections, townships, and ranges is contained in the subjoined list and description, marked Schedule "A," but excepting from said conveyance all lands used for the track of said railroad, to wit, a strip of land across each of said lands crossed by said railroad fifty feet in width on each side of the centre line of the main track of the Winona and St. Peter railroad as the same is now located and constructed, and any greater width, not exceeding one hundred feet in width on each side of said centre line, where necessary permanently to include all cuts, embankments and ditches and other works of said company necessary to secure and protect its main line of railroad, and all depot grounds at the several stations and lands used for other purposes necessary and incident to the operation of said railroad, the same to be described by metes and bounds, or other suitable description, and included in the exception to the grant of any section in which any of said lands are situated. And it is further ordered and decreed that plain-
18 tiffs do recover of the defendant their costs and disbursements, to be taxed by the clerk.

R. R. NELSON, *Judge.*

Whereupon the plaintiffs in open court prayed an appeal, and an appeal is allowed in open court upon their filing within the time prescribed by law a bond, with sufficient sureties, to be approved by one of the judges of this court, in the sum of one thousand dollars in case no supersedeas is desired; but in case a supersedeas is desired, then in the sum of ten thousand dollars, to be approved as aforesaid.

R. R. NELSON, *Judge.*

19 The following is the schedule referred to in the above decree, to wit:

EXHIBIT "A."

Parts of section.	Sec.	Township.	Range.	Acres.	Remarks.
Und. ½ n ½	5	106	36	157.59	
W ½	5	107	36	316.72	
All	7			634.08	
N ½ of n w ¼, und. ½ s ½ of n w ¼ & und. ½ s w ¼	17			200	
Und. ½ all	19			320.72	
" w ½	29			160	
" all	31			318.13½	
All	7	108	36	606.40	
N w ¼ and n ½ of s w ¼	17			240	
All	19			605.44	
W ½	29			320	
All	31			621.12	
S w ¼	5	109	36	160	
All	7			639.63	
W ½	17			320	
N w ¼ & n w ¼ of s w ¼	19			199.33	
E ½ of n w ¼ & s w ¼	29			240	
All	31			639.81	
All	5	110	36	661.83	
All	7			642.98	
All	19			636.25	
W ½	29			320	
All	31			640.63	
N w ¼ of n w ¼, s ½ of n w ¼ & s w ¼	5	111	36	277.03	
All	7			644.23	
W ½	17			320	
All	19			637.44	
W ½	29			320	
All	31			631.59	
Und. ½ n ½	1	106	37	155.68	
S ½ n e ¼, s ½ of n w ¼ & s ½ of s e ¼	2			240	
Und. ½ fr. w ½, und. ½ e ½ of n e ¼ and und. ½ s w ¼ of n e ¼	3			147.28	
S ½ of n e ¼	4			80	
Und. ½ all	5			307.68	
" e ½	7			160	
				13,521.59½	
20				13,521.59½	
All	1	107	37	643.24	
All	3			640.17	

Exhibit "A"—Continued.

Parts of section.	Sec.	Township.	Range.	Acres.	Remarks.
All	5			637.61	
E ½	7			320	
N ½ of n w ¼	8			80	
All	9			640	
All	11			640	
N ½ of n e ¼ & n ½ of n w ¼	13			160	
Und. ½ of s ½, und. ½ s ½ of n e ¼ and und. ½ s ½ of n w ¼	13			240	
N ½ of n e ¼ & n ½ of n w ¼	15			160	
Und. ½ of s ½, und. ½ s ½ of n e ¼ and und. ½ s ½ of n w ¼	15			240	
All	17			640	
Und. ½ of e ½	19			160	
" all	21			320	
" "	23			320	
" "	25			320	
" "	27			320	
Und. ½ n ½, n ½ of s e ¼, s e ¼ of s e ¼ & s w ¼	29			300	
Und. ½ e ½	31			160	
Und. ½ n ½ of n e ¼, s w ¼ of n e ¼, n w ¼ & s ½	33			300	
E ½ of n w ¼ & n w ¼ of n w ¼	34			120	
Und. ½ all	35			320	
All	1	108	37	645.60	
All	3			632.15	
All	5			640.06	
All	7			640.02	
All	9			640	
All	11			640	
N ½	13			320	
All	15			640	
All	17			640	
E ½ & n ½ of n w ¼	19			403.44	
N ½	21			320	
S ½				320	
				27,683.88½	
				27,683.88½	
21 All	23	108	37	640	
All	25			640	
All	27			640	
All	29			640	

Exhibit A—Continued.

Parts of section.	Sec.	Township.	Range.	Acres.	Remarks.
All (ex. n w ¼ of n w ¼ & lot 1	31			426.53	
All	33			640	
All	35			640	
All	1	109	37	632.80	
All	3			617.83	
All	5			617.60	
All	9			640	
E ½ e ½ of n w ¼ & e ½ of s w ¼	11			480	
W ½ of n w ¼ & w ½ of s w ¼				160	
All	13			640	
"	7			636.03	
"	15			640	
"	17			640	
"	19			632.74	
"	21			640	
"	27			640	
"	29			640	
"	31			637.75	
"	33			640	
"	35			640	
"	1	110	37	636	
"	3			616	
"	5			605.86	
"	7			645.03	
"	9			640	
"	11			640	
"	13			640	
"	15			640	
"	17			640	
"	19			644.53	
"	21			640	
"	23			640	
				49,752.58½	
22				49,752.58½	
All	25	110	37	640	
All	27			640	
All	29			640	
All	31			633.83	
All	33			640	
All	35			640	
All	1	111	37	632.42	

Exhibit A—Continued.

Parts of section.	Sec.	Township.	Range.	Acres.	Remarks.
S ½ of n e ¼, n w ¼, & s e ¼, n e ¼ of s w ¼, s w ¼ s w ¼	3	.....	.....	471 51	
All	5	.....	.....	626.24	
All	7	.....	.....	607.68	
All	9	.....	.....	640	
N e ¼ of n e ¼, s w ¼ of n e ¼	10	.....	.....	80	
N ½, e ½ of s e ¼, n w ¼ of s e ¼ & s ½ of s w ¼	11	.....	.....	520	
E ½, n w ¼, e ½ of s w ¼ & n w ¼ of s w ¼	13	.....	.....	600	
E ½ of n w ¼, n ½ of s w ¼ & s w ¼ of s w ¼	15	.....	.....	600	
E ½, n w ¼, e ½ of s w ¼ & n w ¼ of s w ¼	17	.....	.....	600	
All	19	.....	.....	619.75	
All	21	.....	.....	640	
N ½ of n e ¼	22	.....	.....	80	
All	23	.....	.....	640	
All	25	.....	.....	640	
All	27	.....	.....	640	
N ½ of n w ¼ & s e ¼ of n w ¼	28	.....	.....	120	
N ½ of n e ¼, s w ¼ of n e ¼, n w ¼ & s ½	29	.....	.....	600	
N ½ of n e ¼	30	.....	.....	80	
All	31	.....	.....	646.75	
All	33	.....	.....	640	
All	35	.....	.....	640	
W ½	19	112	37	292.22	
W ½ of n e ¼, s e ¼ & w ½	29	.....	.....	560	
All	31	.....	..	622.56	
W ½ of n e ¼, s e ¼ & w ½	33	.....	.....	560	
				66,985.54½	

23 And afterwards, to wit, on the 6th day of October, A. D. 1885, the following bond on appeal was filed in this cause, said bond being in the words and figures following, viz:

Bond on Appeal.

United States Circuit Court, District of Minnesota.

ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. HOYT, SAMUEL N. Hoyt, William C. Fargo, N. C. Barney, Charles T. Barney, Angus Smith, Benjamin P. Cheney, Lucy L. Barney, N. C. Barney, Sarah B. Sturges, Bell D. Gurnee, H. S. Barney, N. H. Barney, by H. W. Lamberton, his next friend; William H. Latham, and Edward P. Latham, Appellants,

vs.

THE WINONA AND ST. PETER RAILROAD COMPANY, Respondents.

Know all men by these presents that we, W. H. Lamberton and F. A. Johnston, as surety, both of the county of Winona and State of Minnesota, are held and firmly bound unto the Winona and St. Peter Railroad Company in the sum of one thousand dollars, to the payment of which, well and truly to be made to the said The Winona and St. Peter Railroad Company, its successors and assigns, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals this fifth day of October, 1885.

____ ____.

____ ____.

The condition of this obligation is such that whereas the said plaintiffs, Ashbel H. Barney *et al.*, are about to appeal from
24 the final order and decree of this court entered in said action on the sixth day of October, 1885, modifying the former decree in said action, which was duly entered on the 13th day of April, 1881, by reducing the number of lands decreed to be conveyed by the defendant to the plaintiffs in and by said original decree:

Now, therefore, if the said plaintiffs, Ashbel H. Barney *et al.*, shall prosecute their appeal to effect, and if they fail to make their plea good shall answer all costs, then this obligation shall be void; otherwise in full force and effect.

H. W. LAMBERTON. [SEAL.]
F. A. JOHNSTON. [SEAL.]

STATE OF MINNESOTA, } ss:
County of Winona, }

H. W. Lamberton and F. A. Johnston, being duly sworn, doth, each for himself, say that he is one of the obligors in the foregoing bond; that he is worth double the amount of the penalty thereof over and above all his debts and liabilities, and exclusive of his property exempt from execution.

H. W. LAMBERTON.
F. A. JOHNSTON.

Subscribed and sworn to before me this fifth day of October, 1885.

[SEAL.] W. C. BROWN,
Notary Public, Minn.

STATE OF MINNESOTA, } ss:
County of Winona, }

Be it known that on this fifth day of October, 1885, before me personally came H. W. Lamberton and F. A. Johnston, to me known to be the per ons who executed the within, and they acknowledge that they executed the forgoing instrument as their free act and deed.

[SEAL.] W. C. BROWN,
Notary Public, Minn.

Endorsed on back: "I hereby approve the within bond and sufficiency of sureties thereof. R. R. Nelson, judge."

25 UNITED STATES OF AMERICA, ss:

To the Winona & St. Peter Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October, 1885, pursuant to an appeal taken from a certain decree entered in the office of the clerk of the circuit court of the United States for the eighth circuit, district of Minnesota, wherein Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, William G. Fargo, N. C. Barney, Charles T. Barney, Angus Smith, Benjamin P. Cheney, Lucy L. Barney, N. C. Barney, Sarah B. Sturges, Bell D. Gurnee, H. S. Barney, N. H. Barney, by H. W. Lamberton, his next friend; William H. Latham, and Edward P. Latham are appellants, and The Winona & St. Peter Railroad Company is respondent, to show cause, if any there be, why the said decree appealed from should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 6th day of October, 1885.

R. R. NELSON, *Judge.*

26 [Endorsed:] Original. Ent. to C. c't. United States circuit court, district of Minnesota. A. H. Barney *et al. vs.* The Winona & St. Peter R. R. Co. Citation to Supreme Court of U. S. Due service of within citation on me admitted this 7th day of October, 1885. Thomas Wilson, att'y for W. & St. P. R. R. Co., respt. Filed Oct. 9th, 1885. Oscar B. Hillis, clerk.

27 UNITED STATES OF AMERICA, } ss:
District of Minnesota. }

Circuit Court of the United States.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of 27 pages, numbered consecutively from one to 27, inclusive, is a true and complete transcript of the records, pleadings, orders, final decree, and all other proceedings in said cause had and entered therein since the filing of the mandate

of the Supreme Court, viz., June 5th, 1885, and of the whole thereof, as appears from the original records and files of said Court; and I do further certify and return that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 12th day of October, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the *one hundred and* 110th year.

[U. S. Circuit Court seal, dist. of Minnesota.]

OSCAR B. HILLIS, *Clerk.*

[Endorsed:] United States circuit court, district of Minnesota. Ashbel H. Barney *et al. vs.* The Winona & St. Peter Railroad Company. Return to Supreme Court.

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SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1885.

ASHBEL H. BARNEY, ET AL.,

Appellants,

vs.

THE WINONA & ST. PETER RAILROAD COMPANY,

Respondent.

ARGUMENT FOR APPELLANTS.

GORDON E. COLE,

Solicitor and of Counsel for Appellants.

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ARGUMENT FOR APPELLANTS.

THE APPELLANT MAKES THE FOLLOWING ASSIGNMENT OF ERRORS.

First. The Court below, in the attempted modification of the original decree, erred in deducting from the original decree all the lands within both the six and fifteen mile

limits of the Minnesota Central line, and between the six and twenty-mile limits of the Winona and St. Peter railroad, which had passed to the Minnesota Central Railroad Company under the act of 1857, although the record showed that the Winona & St. Peter Railroad Company did not *take an acre of those lands under its grant, nor any indemnity lands in lieu of them*, but that there were within the same limits many thousands of acres of land which never passed to the Minnesota Central Railroad Company, which had been taken by pre-emptors, which quantity of land was largely in excess of all the lands within said limits, which passed to said Central Company. The record also showed that the Winona & St. Peter Company acquired its ten sections to the mile, not by taking lands which had passed to the Minnesota Central, or lands in lieu thereof, but by taking indemnity lands for deficiencies caused by sales and pre-emptions within the same limits, as it lawfully might. Hence, under the decree of this Court, the Court below erred in making *any* deduction on account of lands which had passed to the Minnesota Central Company.

Second. If any deduction should be made, the Court erred in deducting from the amount of lands ordered to be conveyed in the original decree lands within the fifteen-mile limits of the Minnesota Central railroad. Such deduction should only have been allowed of lands in place or within the granted or six-mile limits.

Third. The Court below erred in confounding the

limits of extension with the limits of selection, and permitting a deduction from the amount of lands granted by the original decree, of all lands which passed to the Minnesota Central Company, prior to March 3, 1865, located between the six and twenty-mile limits of the Winona road.

It should have confined the deduction to lands located between the six and ten-mile limits of the Winona road, or, if not that, then, to those situate outside of the fifteen and within the twenty-mile limits of the last named road.

I.

These assignments of error present three questions for the consideration of the Court.

1st. Whether the Court below did not mistake the entire scope and meaning of the decision of this Court, which, without intending to determine the question whether there were lands to be deducted or not, as a question of fact, simply reversed the original decree because the decision of the Circuit Court was based in part upon *an erroneous theory of law, under which lands might* have been taken in lieu of those previously granted to the Minnesota Central Company. It assumes that this Court had decided that all such lands must be deducted, whether they had entered into and helped swell the amount passing to the Winona Company or not, and so deducts about sixty-seven thousand acres of land from the lands of the Winona Company *which had never entered into its grant at*

all, or been taken into account in making up the lands which it actually received.

2d. If this assumption of the Court below was not erroneous, then, what is the extension of the prior grant made by the act of 1865?

3d. And what are the lands to be deducted from it, viz: "*any lands which may have been granted to the Territory or State of Minnesota for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant;*"

In order to aid the Court in arriving at an intelligent understanding of the points we desire to make, we here refer to certain facts shown by the original record.

The total quantity of land unsold, or to which pre-emption rights had not attached prior to the date of the act of March 3d, 1857, within the six-mile limits of the Central, and between the six and twenty of the Winona Road, was about 32,000 acres only, (See *Folios* 1129, 1130, *Original Record*). The total quantity within the six and fifteen-mile limits of the Central, and between the ten and twenty-mile limits of the Winona, that the United States had not sold, or to which pre-emption rights had not attached prior to March 3d, 1857, was about 23,000 acres only. (*Page* 792, *Original Record*).

All the lands, not taken by pre-emptors within fifteen miles of the Minnesota Central road, and between six and fifteen miles of the Winona road, had been com-

pletely absorbed and applied to the six-section grant of 1857, prior to the passage of the act of March 3d, 1865. (*Pp.* 47, 48, 55 *to* 62, 257 *to* 260, 262 *to* 271, *Original Record*). The conflicting limits extend along the course of the Winona road, within ranges 16 to 24 inclusive. All the lists are in evidence, showing the dates and mode of taking and for what taken of all the lands within these limits.

After the date of the act of 1865, the Court, by examining the lists, will see that no lands were certified lying within these ranges, and within the fifteen-mile limits, except an occasional stray forty, which had been overlooked in the previous selection.

After the act of 1865, but an inconsiderable number of acres remain within these ranges, which were taken by the Winona road as indemnity for deficiencies in the ten-mile limits outside the fifteen and within the twenty-mile limits of the Winona road.

Page 118, *Original Record.*

These were lands selected by the agent of the governor, *as it is stated in the certificate*, "from the lands of the United States, designated by odd numbers, nearest to the tiers of sections within fifteen sections in width on each side of the Winona road, and in lieu of land in alternate sections, designated by odd numbers, within *ten* sections in width, which the United States had *legally sold* or otherwise appropriated, or *to which the right of pre-emption had attached.*"

See *page* 117, *Original Record.*

This is in the heading of the lists. In the closing certificate, at its end, the Secretary certifies "that the lands have been selected in lieu of the land in the alternate sections, etc., and that they are now submitted for the approval of the Secretary of the Interior, in accordance with *the requirement" of the acts of March 3d*, 1865, *and July 13th*, 1866.

Page 124, *Original Record.*

So that if the coterminous principle affixed by the act of 1865 had not been abrogated by the act of July 13, 1866, the Company would have secured practically no lands under the extension grant for its road within the conflicting limits of the two roads, as all the odd numbered sections, not taken by the companies under the act of 1857, had been taken by pre-emptors prior to the extension grant.

But this certificate, as all certificates throughout the record, shows how the grant was administered, and that the departments all construed the act of July 13, 1866 as allowing the selection of indemnity lands for all lands sold or pre-empted within the increased limits of ten miles.

They also show that the practice and construction was to go into sections beyond the coterminous limits of constructed road to select indemnity lands. And the Respondent, who has contracted with the Appellants to convey to them all the lands it should receive for constructing that portion of its road between Winona and Waseca, has actually received full indemnity lands, by selections beyond the coterminous limits of constructed road.

See, for the contract, *the last paragraph on Page 7 of the Original Record.*

On November 17, 1873, the commissioner of the general land office certified a list, described in his certificate as "outside the ten and within the twenty-mile limit, under the act of Congress of March, 1865, being from the lands of the United States in the alternate sections designated by odd numbers most contiguous to the tiers of sections for ten sections in width on each side of the road, and being in lieu of lands in the alternate sections designated by odd numbers within said ten sections in width on each side of said road, which the United States *had legally sold or to which pre-emption rights had attached* prior to the period at which the rights of the State inured under the grant, and they are now submitted for the approval of the Secretary, in accordance with the requirements of the acts *of March 3, 1865, and July 13, 1866.*"

Page 200, Record.

See for another of the same kind, *page 196.*

These certificates show that practically in administering the grant, the increased grant of four sections was considered as governed by the provisions of section one of the act of 1857, relating to the selection of indemnity lands, as amended by section two of the act of 1865, and that the act of July 13, 1866, regarding the selection of deficiency lands, was construed as applying to the increased grant of 1865, as well as to the original one of 1857.

On Oct. 22, 1873, the commissioner of the general land office certifies a list of indemnity lands in lieu of lands

within the ten-mile limits of both the Minnesota Central and the Winona road.

He says, "I, Willis Drummond, Commissioner of the General Land Office, do hereby certify that the foregoing on page one is a true and correct list of land, selected by the agent of the State of Minnesota, outside of the ten and within the twenty-mile limits, under the act, etc., of 1865. The said selections being from lands of the United States in the alternate sections, designated by odd numbers, most contiguous to the tiers of sections within ten sections in width on either side of the branch *via* Faribault to the north line of the State of Iowa, ("*being the Minnesota Central, or Cedar Valley*") and from Winona *via* St. Peter, ("being the Winona road"), and being in lieu of lands in the alternate sections, designated by odd numbers, within said ten sections in width on each side of said road, which the United States *had legally* sold, or to *which the right of pre-emption had legally attached*, prior to the period when the rights of the State inured under said grant, and they are now submitted for approval to the Secretary of the Interior, in accordance with the requirements of acts of March 3d, 1865, and July 13th, 1866."

Page 198, *Original Record*.

This certificate shows that the lands selected for deficiencies within the conflicting limits of these roads were for such deficiencies, as were provided for by section one of the act of 1857, as amended by the second section of the act of 1865, to-wit: for lands which "the *United States* had *sold, or to which pre-emption rights had attached*," and also that the act of July 13th, 1866, was considered and construed as applying to the increased grant, and that no

lands were selected for deficiencies occasioned by lands lost to the grant by reason of the prior grant to the Minnesota Central.

All the certificates are in the record, and there are and were no selections of indemnity lands for lands taken by the Minnesota Central.

Section 2 of the report of the special masters shows that the map, which is on file here as a part of the record, correctly shows the line of Defendants road through its entire length, as the same was definitely fixed and located, and the subdivisions, sections, towns and ranges through which it is located. It also shows land limits of the land grants of the United States to the Territory and State of Minnesota in aid of Defendant's road, as said land limits were fixed and adjusted by the Secretary of the Interior, and in accordance with which the lands were certified to the State by the Secretary of the Interior, and conveyed by the State to Defendants. This map divides up the grant into six, ten, fifteen and twenty-mile limits, and clearly shows how the grant was regarded by the department. Said map also shows the tracts, subdivisions and sections falling within said limits. It also shows the lands certified by the United States to the State under the grants, in aid of Defendant's road, and deeded by the State to the Defendant, and the exact description and location of said lands.

All the colored red were deeded to the Defendant in severalty. The Minnesota Central Railway, which is

crossed by Defendant's line of road in town 107, range 20, is one of the land grant roads, and a beneficiary under the acts of 1857 and 1865. Neither road was built to or past the crossing until after March 3d, 1865.

Page 696, *Original Record.*

The 18th finding of the Special Masters, on *page* 702 *of the Original Record*, is as follows:

"As to that part of Defendant's road, constructed under the act of March 3d, 1865, between Rochester and Waseca, there is, and always has been, land enough in alternate odd sections, within ten miles of said road, conterminous with said line, between Rochester and Waseca, and outside of ten and within twenty miles conterminous therewith, or lying westerly of Waseca, to supply for building that portion of said road from Rochester to Waseca, a full grant of ten sections per mile, if such lands are applicable thereto."

While on a second appeal, nothing is reviewable except what transpired after the first decision, viz.: the proceedings of the Court below in executing the mandate of this court, yet needful explanations may be derived from the original record.

The Lady Pike, 6 *Otto*, 462.

Hence we have referred above to such parts of the original record as we deemed material. As before said, the Court below construed the decision of this Court as requiring all lands, which had passed to the Minnesota Central Company by the act of March 3, 1857, whether directly by force of the grant within the six-mile, or place limits, or whether those selected in lieu of, and to supply deficiencies occuring in other parts of its line, to be deducted from the decree. In other words, the deduction was of all the lands which passed by grant or selection to the Central Company, within both its six and fifteen-mile limits, which lay within what the Court below construed as the limit of the extension of the Winona grant, to-wit: outside of six and within twenty miles of its line, and by this very broad, and, as we think, utterly unwarranted construction, has caused the enormous quantity of about sixty-seven thousand acres to be deducted from the original decree.

The Court below expressed grave doubts, and said that if the question had been a new one, they would have held differently, but deemed that the Court was bound by what they understood to be meant by the decision of this Court in this case and perhaps still more in the case of the *St. Paul & Sioux City Railroad Co. vs. The Winona & St. Peter Railway Co.*, 112 *U. S.*

See *Barney vs. Winona & St. Peter Railroad Co.*, 24 *Federal Reporter*, 889.

Feeling the force of the doubts, they ordered the case

referred to special masters to report, and who did report, the number of acres which had, prior to the date of the act of March 3d, 1865, passed as follows, to-wit:

(*a.*) The amount within fifteen miles of the Minnesota Central line and between the fifteen and twenty-mile limits of the Winona & St. Peter road—to which the masters replied 23,398.51 acres, of which 6,399.81 acres are in the six-mile or granted limits of the Central road; and 16,998.69 acres between the six and fifteen-mile limits or indemnity limits of the Central road.

(*b.*) The amount within six miles of the Central road and between the six and ten-mile limits of the Winona road—to which the masters answered 15,000.46 acres.

(*c.*) The amount between the six and fifteen-mile limits of *both roads*—to which the masters answered seventeen thousand, six hundred and fifty-eight and six and one-half-hundredths acres, of which nine thousand, one hundred and forty-four and eleven and one-half-hundredths are between the six and ten-mile limits of the Winona road and between the six and fifteen-mile limits of the Central; and eight thousand, five hundred and thirteen and ninety-five and one-half-hundredths acres are between the ten and fifteen-mile limits of the Winona road.

(*d.*) The amount between the six and fifteen-mile limits of the Central and between the fifteen and twenty-mile limits of the Winona road to—which the masters

answered, sixteen thousand nine hundred and ninety-eight and sixty-nine-hundredths acres.

(c.) The amount within the six-mile limits of the Central and between the ten and fifteen-mile limits of the Winona road—to which the masters answered, ten thousand, nine hundred and thirty and seventeen-hundredths acres.

These data the Court states, in its interlocutory decree, it orders found in order that this Court may have the data to correct any error in the decree.

The question in the case is, whether any of the lands directed to be conveyed to the Plaintiffs by the original decree, shall be deducted, and if so, to what extent.

Upon the original hearing of the case in the Circuit Court, his Honor, Judge Dillon, held that any loss to the Defendant from the extension grant of 1865, by reason of the prior grant to the Minnesota Central road, could be treated as a deficiency in the grant and be made up elsewhere in the indemnity limits, the coterminous principle not applying thereto.

Original Record, page 694.

And at a subsequent hearing before his Honor, Justice Miller, the rulings of Judge Dillon were approved.

Original Decree, page 790.

And a decree was accordingly entered. Now it would be quite natural to suppose that under this ruling, the Defendant was charged in the decree with lands selected west of the conflicting limits of the two roads, to make up for lands taken from the extension grant by the Central road. This Court held that the Circuit Court was in error in holding that any deficiency in the extension grant, on account of lands previously granted to the Central road, could be made up by selections elsewhere within the indemnity limits and inferring from the ruling of the Circuit Court that the Defendant was charged in the decree with lands thus selected, the case was sent back with orders to deduct the same.

The decision affirms the decree in respect to the quantity of land with which the Defendant should be charged as accruing to it, under the original six-section grant, and leaves unsettled only the question as to what deduction, if any, must be made from the decree on account of land with which it charges the Defendant as accruing to it under the extension grant within the conflicting limits of the Central and Winona roads. And upon this point the decision of this Court was, that the Defendant could not se-

lect other lands on other sections of its road in lieu of those which had been taken by the Central Company.

Now, as we have already seen, it appears from the record that the Winona Company did not select nor receive an acre of land on its extension grant in lieu of any land taken by the Central Company, and was not charged in the decree with any such lands. Hence the error in the decision of the Circuit Court was practically of no importance in the case. It did not enter into, or in any way effect the decree. There were lands to fill the extension grant independent of, and without taking any in lieu of those taken by the Central Company.

It may be remarked, however, that if there had not been, the first section of the act of July 13, 1866, 14 Statutes at Large, 103, authorized selections to be made to supply deficiencies caused by any sale or disposition of lands by the United States after the definite location of the roads in 1857 and before withdrawal under the act of 1865. This act, if necessary, would have conferred authority to select lands to fill the extension grant in lieu of those selected to supply deficiencies in the original grant to the Cedar Valley Company. It was in substance and effect an additional grant to that of 1865, and Congress must have had express reference to the right of other companies to select indemnity lands within the limit of the extension as well as to pre-emptions and sales which had gone on since 1857 and up to the withdrawal under the act of 1865.

The conflicting limits of the two roads embraced a tract of forty miles square, which would contain 1,600 sections, or 800 odd numbered sections, being 400 sections for each

road, or ten full sections per mile for the forty miles, provided that none of the land had been previously disposed of to other parties. But the greater portion of the lands had been previously taken by pre-emptors. The two companies did not invade each other's grant; but pre-emptors had taken the lands, so that neither company could get its full quota within those limits. The deficiency in the extension grant did not arise from the lands taken by the Central Company, but from lands taken by pre-emptors, and for such and only such deficiencies did the Winona Company select and take other lands elsewhere. Could not this be done? The record shows that it was done, and that the Defendant got the lands, and the original decree charged it therewith, and not with any land taken in lieu of lands received by the Central Company.

If the Defendant company had the right to select other lands within the indemnity limits, in lieu of the lands taken by pre-emptors which would otherwise have accrued to it under the grant, then the original decree was correct as to the quantity of lands that Defendant should convey to the Plaintiff. Can there be any doubt that such right existed? Speaking of the extension grant, Mr. Justice Field in delivering the opinion of the Court in this case says: "The only lands granted by the act of 1865 are the four sections for each mile additional to the original six, *accompanied with a right to select indemnity lands within twenty miles of the road.*"

Indemnity lands for what? Not for any lands granted

to the Central Company, but for lands taken by pre-emptors.

This right is brought out into clear view when we consider the relation the act of 1865 bears to the act of 1857. The former act is merely amendatory of the latter. The act of 1857 granted six sections per mile upon certain limitations, among which were, that they should be alternate sections designated by odd numbers for six sections in width on each side of the road. By the act of 1865, the original grant of "six sections is increased to ten sections per mile," subject to the same "limitations" as appertained to the original grant – that is, among other limitations, the additional grant must be confined to alternate odd numbered sections within the extended limits of ten miles. Congress supposed this sufficiently indicated where the sections were to be taken, and therefore said nothing further in the act on that point. Had that not been the intention and understanding of Congress, there would have been something further in the act upon the subject. But by coupling the increased grant to the original grant and subjecting it to the same limitations, leaves no room to doubt that the intention was to grant by the two acts, taken together, the alternate sections designated by odd numbers for ten sections in width on each side of the roads.

This view of the matter is placed beyond all question by section four, which doubles the price of the lands reserved to the United States within ten miles of the roads. The original act doubled the price of the reserved lands

within six miles of the road, and the act which increases the grant to ten sections, extends the double price on the reserved lands to ten miles. Nothing could more clearly indicate the intension and understanding of Congress as to the nature and extent of the grant. *Congress never doubles the price of lands except where the alternate sections have been granted, and wherever the alternate sections are granted, the reserved sections are duplicated in price.* This shows that the alternate sections within ten miles of the road were considered as granted, and that those between ten and twenty miles were indemnity lands.

The act is spoken of in section six as an amendment to the act of 1857.

Section two, in express terms amends the first proviso in section one, of the act of 1857, which relates simply to the indemnity limits.

If the act of 1865 is not in form amendatory of the act of 1857, it is so in substance and effect, and the acts must be read together in order to interpret their meaning and gather the intention of Congress.

Section one, of the act of 1865, adds four sections per mile to the original grant, subject to the same limitations as were imposed upon the original grant. Whether section one is considered as an independant grant or as amendatory of the original grant is immaterial, as the whole ten sections per mile are subjected to the same provisions and limitations.

Section two, as before remarked, in express terms, amends the first proviso in section one, of the original act, by extending the indemnity limits from fifteen to twenty miles.

Section three reserves certain lands previously granted from the operations of the extension grant, but declares nothing that would not be held to be the law in the absence of such declaration. The provision that certain lands previously granted 'shall be deducted'' from the extension grant, simply means that they shall be excepted, or excluded therefrom. And the use of the phrase, "from the full quantity of lands hereby granted," in reference to the extension grant, was held as simply applying the coterminous principle, which principle is affixed to the whole ten sections by section six. Section three, therefore, may be wholly dropped out of view, for the act would receive the same construction in its absence as with its presence. But whatever view may be taken of the section, it in no way affects the point we are now considering.

Section four refers to both acts, and duplicates the price of the reserved lands within ten miles of the road, and is a substitute for section two of the original act.

Section five imposes a trust upon the State and burden upon the railroad companies.

Section six, among other things, modifies the original grant by allowing lands to be taken upon the construction

of ten instead of twenty mile sections of the road, and by affixing the coterminous principle to the entire grant.

Section seven provides for withdrawing the lands from market.

The other sections relate to special matters.

Now, if the provisions applicable to the original grant do not extend and apply to its increase, where and how is that increase to be located? Where is the authority in the act of 1865 for saying that, the four additional sections are to be selected beyond six and within twenty miles of the road; or that they are to be *selected* by any body.

It cannot be found. Section two, becomes a part of section one of the original grant, and only relates to indemnity limits. To ascertain where the increase of the first grant is to be made up, you must go where the act points, viz.: to the original grant and its limitations. You there find the grant to be limited to the alternate odd numbered sections for six sections in width on each side of the road, with the right to make up deficiencies within fifteen (now twenty) miles of the road. Apply these limitations to the increased quantity granted and you have plain sailing and will carry out the manifest intent of Congress, viz.: the alternate odd numbered sections for four sections in width on each side of the road, adjoining the original grant, and with the same indemnity rights and limits.

In no other way can the grant be limited to odd num-

bered sections, or authority be found, to locate it anywhere. There is nothing in either act which classes the grant with indemnity lands, or authorizes them to be selected indifferently between six and twenty miles of the road. If the intention had been to extend the grant to the alternate sections within twenty miles of the road, (except for indemnity purposes) the reserved sections to that limit would have been duplicated in price. True, the grant is one of quantity; the lands to be taken beyond six and within twenty miles of the road, but subject to the limitations as prescribed in respect to the six sections per mile in the original grant.

The indemnity provisions, therefore, in the first section of the act of 1857, as amended by the act of 1865, become equally applicable to the extension grant.

Now, turn attention to the act of July 13th, 1866, entitled "an act relating to lands granted to the State of Minnesota to aid in constructing railroads," (14 *U. S. Statutes at Large*, 103) and we find that by section four the coterminous principle, as respects the selection of deficiency lands, is done away with.

Thus the law stood in respect to the land grants, and under which the Defendant company constructed its road from Rochester to Waseca. It was found that there was a large deficiency in the extension grant by reason of the pre-emptions, and the company thereupon selected and took other lands within the indemnity limits in lieu of those lost by said pre-emptions, whereby the extention grant was

filled. Such was the construction and administration of the land grants by the land department.

Why, then, should there be *any* deduction from the extension grant.

The Court below expressed itself as strongly of the opinion that the construction above given, which treats the act of 1865 as amendatory of that of 1857, and as broadening out the place limits from six miles to ten, and the indemnity limits from fifteen to twenty, would, as an original question, be considered as the correct one. But relying upon some language of this Court used not in this case, but in that of the *Sioux City Company vs. The Winona Co.*, 112 *U. S.*, which was but a *dictum*, as we shall hereafter show; it treated the additional grant made by the act of 1865, as a purely independent grant to which the provisions of the act of 1857 for the selection of indemnity lands had no application. It ignored the language of Judge Field in this case, that the grant of the four sections was "*accompanied with the right to select indemnity lands within twenty miles*", and hence to be selected within the limits of between six and twenty miles of the road. Deeming that the language of the act of 1866, relieving lands selected for deficiencies from the coterminous principle had no application to the increased grant of 1865, and confining the four section grant within coterminous limits, it deducted all lands theretofore passing to the Central Company located within the limits of selection. If such a result were logically possible, even upon that construction, which we hope hereafter to show it was not, yet the Court below, as we think, utterly

misconstrued the language and meaning of this Court. Indeed much of the language of this Court in the Barney case is consistent with no other construction than that adopted by us.

The strength of the argument, that the act of 1865, (13 *Statutes at Large*, 526,) makes an entirely independent grant, notwithstanding the increase is expressly declared *to be under the same limitations*, as the original act, rests on the stress laid on the word *quantity*, "which, it is argued," implies a float, without specific designation of any particular sections, and which depends upon selection, and hence, as there are no lands in place, there can be no indemnity selections. This understanding of the meaning of the word "quantity," in an independent grant, might have force, but even then, primarily, the Secretary would be required to select within ten miles of the line of road, and only to go outside in case there were deficiencies within those limits. The grant of a specific number of sections on each side of the road, although by terms of quantity merely, would fix ten-mile limits, and all outside would be selected for deficiencies, and the act of 1866, (14 *Statutes at Large*, 103,) declaring that the coterminous principle should not apply to lands taken to make up deficiencies, would apply to lands so selected.

See *Wood vs. Railroad Co.*, 104 *U. S.* 329.

And this is all the language of this Court means, when it declares that the lands are to be selected by the secre-

tary outside of six and within twenty miles. They are first to be selected within the ten-mile limits, and the selections outside are for deficiencies within those limits. But the force sought to be given to the mere use of the terms, "the quantity shall be increased to ten sections per mile," can hardly outweigh the clear and distinct enunciation of the intent of Congress, that the increase should be subject to all the limitations of the original act, and the more clear evidence of its intent in the amendment by section two, after increasing the original grant by section one, by striking out the limit of fifteen miles for indemnity selections, and inserting twenty, thereby fixing, (and it is the only place where it does fix), lateral limits of twenty miles for indemnity selections. And if these indemnity selections do not appertain to the increased grant, it has no lateral limits.

This is not an independent grant, but the enlargement of a previous one, and the terms in which it is enlarged, must be studied by the aid of its associate language in the original act, and the amendatory one. *Noscitur a sociis*, is a pertinent maxim here.

This court seems to have taken this view of the language used, increasing the grant. They say: "the use of the term 'quantity of lands granted' by the first section, in referring to the amount granted by the act of 1857, *is of no significance*."

There has been a distinction recognized in this Court, we are aware, between a grant by quantity and one by de-

scription. *This* distinction becomes chiefly material when the question is whether wanting sections, or those expressly reserved, can be supplied elsewhere, where there are no coterminous limits; deficiencies in a grant by quantity being any falling short of the grant, while in a grant by description they can only be supplied from indemnity lands when caused by pre-emptions and other dispositions for which express provision is made.

That distinction does not become material in the consideration of the present question.

We have seen that in a grant by quantity, as in the case last cited, there may be a primary grant and land limits, and the lands taken outside of these limits are really taken to make up deficiencies within them, so that the mere fact of the use of the term "quantity" here does not prevent the act of 1865 from being an amendment of that of 1857.

And for the purpose of considering whether it is an amendment, it isn't material whether the six sections are increased to ten, or whether the number six is stricken out and ten inserted in its place.

In the case of *Kansas Pacific vs. Atkinson Railroad*, 112 *U. S.*, 417, an amendatory act was passed, doubling the original grant, and extending the limits, and the Court held that thenceforth the original act is to be read as against the United States, and all parties not having ac-

quired, in the meantime, paramount rights as though the substituted numbers were originally inserted therein. The title to the increased quantity of lands must therefore be deemed to have passed to the grantee at the date of the original act.

The act of 1865 very carefully provides that nothing herein contained shall interfere with any existing rights, acquired under any act of Congress heretofore enacted, making grants of land to aid in the construction of railroads.

If the act of 1865 was an independent grant of four sections, it could not effect any prior grant; but if it was an amendment taking effect, as of the date of the act of 1857, as to all but parties acquiring intervening rights, the Minnesota Central, taking under the same grant, and having lands in place within its six-mile limits, which also lay between the six and ten of the Winona Company, would have taken as tenants in common with it; that is, its original grant must have been shared with the extension grant of the Winona Company.

But it was the intention to preserve all existing rights of the Companies under the act of 1857, unaffected by that of 1865, hence the necessity of this provision, treating the act of 1865 as an amendment. As we have seen, the act of 1857 duplicated the value of the lands remain-

ing to the Government within the six-mile limits; the act of 1865 did the same within the increased or ten-mile limits, thus establishing ten-mile limits and showing the intent to treat the increased grant as in all respects similar to the original one, save only the enlargement.

But contemporaneous construction is almost conclusive in such matters. Where a long and settled practice has grown up from the beginning, uniformly followed by the officers of the Government charged with the administration of the grant, and acquiesced in by the parties taking under it, the Courts will usually adopt it as the correct construction. This Court has frequently recognized the rule, thus, in *United States vs. Burlington Railroad*, 98 U. S., 341, it said, referring to a construction which had been put upon the act under consideration in that case, "such has been the uniform construction given to the acts by all departments of the Government, patents have been issued, bonds given, mortgages executed, and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It cannot at this day be called in question." Quoted with approval by this Court in *Kansas Pacific R. R. Co. vs. Atkinson R. R.*, 112 U. S., 419.

Nobody ever doubted that under the act of 1857, as amended by the act of 1865, there were six, ten, fifteen and twenty-mile limits, that the six and ten-mile limits were place limits, and the fifteen and twenty, indemnity limits; that where, under the act of 1857, lands "granted"

fell within six miles of the line of the road, they, after the act of 1865, fell within ten; and where under the act of 1857, indemnity lands were selected for deficiencies in the six-section grant, outside of the six and within the fifteen-mile limits, after the act of 1865, indemnity for deficiencies within the ten-mile limits, might be selected outside of the ten and within the twenty-mile limits.

Every one of the Minnesota land grants has been administered on this theory. The officers of the Government have all acted upon it, the contract in suit expressly contracts to convey all the lands within the six, ten, fifteen and twenty-mile limits. The printed record in this case is a voluminous and complete history of all the dealings of the Government with this company. The large map, compiled from Government and official sources, which is a part of the record and on file in this Court, has the six, ten, fifteen and twenty mile limits laid down upon it. The record is full of lists of selections of indemnity lands, within the twenty and outside of the ten-mile limits, to supply deficiencies within the ten-mile limits, made by the company and certified and approved by the Commissioner of the General Land Office and the Secretary of the Interior. There is, we are told, a book published by the United States, entitled the Public Domain, which contains a tabulated statement on pages 276 and 277, of the land grant railroads, and every one of the Minnesota roads, taking under the acts of 1857 and 1865, is stated as having ten

and twenty-mile limits, and those located prior to March 3d, 1865, have also the six and fifteen-mile limits.

The Attorney General of the United States, in his opinion, published in *The Washington Law Reporter, vol. 8, page* 679, *John L. Ginck & Co., Publishers*, 641 *F St., Washington, D. C.*, holds that indemnity limits exist under the act of 1865, and that it preserves the distinction between lands in place and indemnity limits, and in this he is expressing the opinion of a succession of generations of secretaries and commissioners of the general land office. Whatever difference of rules and clashing of opinions there has been in those departments, there has been none, I think, in this.

The Attorney General, in the opinion referred to, holds, if we understand him, that the act of 1865 does not grant by quantity, but that although it increases the grant to ten sections per mile, it is still to be construed as a grant by description of every alternate section within ten miles of the road, and that the indemnity limits still exist; place limits being enlarged from six to ten and indemnity limits from fifteen to twenty. But in the case of *St. Paul Railroad vs. Winona Railroad*, 112 *U. S.*, 720, it is claimed, this Court used language apparently inconsistent with this position. Suppose that it did, it was merely a *dictum*, like that in the Leavenworth case, not necessary to the opinion. But we shall hereafter show that when Judge Miller's

language is read in connection with his decision in this case, it has no such meaning as is claimed for it.

The question presented was this, the St. Paul Company was one of the Companies taking under the act of 1857. Subsequent to that act and prior to the act of 1865, to-wit.: on May 12, 1864, it received an increased grant in this language, "that there be and is hereby granted to the State of Minnesota, for the purpose of aiding in the construction, etc., (St. Paul Co's road,) four additional sections of land per mile, to be selected upon the same conditions, restrictions, and limitations as are contained in the act of Congress, entitled an act, &c., referring to the act of 1857, provided that the land, so to be located by virtue of this section, may be *selected* within twenty miles of the line of said road, but in no case at a greater distance therefrom."

The Court will perceive at a glance the striking dissimilarity between this act and the amendatory act of 1865. The former expressly provided for *selection* within twenty miles of the road.

The St. Paul Company claimed some lands which were located outside of its fifteen and within its twenty-mile limits. The same lands were within the fifteen-mile indemnity limits of the Winona road. It will be perceived that no question of the construction of the grant within the ten-mile limits was presented.

The St. Paul Company claimed that priority of location

of its line gave it priority of right, but the Court held that between parties taking under the same act, neither could acquire a title except upon selection. The St. Paul Company had made no selection; the Winona Company had. It is obvious that whether the St. Paul Company claimed under its special grant of 1864, or under the general act of 1865, the holding must have been the same. As to lands between its fifteen and twenty-mile limits it could derive no title until it had selected them, and such was the decision. There was no need to say anything of the lands in place between the six and ten-mile limits.

But in deciding that question, the Court said, "there is nothing in either of these statutes, the special act of 1864, or the act of 1865, which indicates or requires that the six-mile limit of the original grant is to be enlarged, so that within a limit of ten miles all the odd sections fall immediately within the grant on the location of the road."

This was true as to the act of 1864, upon which the St. Paul Company chiefly relied. We do not think it entirely accurate as applied to the act of 1865, although perhaps sufficiently so, for the decision of the question then before the Court.

The Court further says: "Both the acts of 1864 and of 1865, speak of the additional sections to be selected, a word wholly inapplicable to lands in place, which are not ascertained by selection but are fixed and determined by location of the line of the road. The act of 1865, which is to

be considered *in pari materia* on this point, provides that these lands shall be indicated by the Secretary of the Interior. What this word indicated means, may admit of some doubt; but taken in connection with the other two statutes and other acts granting lands to aid the construction of railroads, it probably means no more than what is expressed in the act of 1857, namely, that the selection of lieu lands shall be made by the governor or his agent and approved by the secretary."

But we respectfully beg leave to call the attention of the Court to the fact that the act of 1865 *does not* provide for or *speak* of the additional sections to be *selected*. If the word "*indicated*" means, as the Court says, no more than what is expressed in the act of 1857, as to the selection of lieu lands, it *does not embrace the additional grant of* 1865, which are not lieu lands. This leaves us wholly without any limitations or directions as to how or where or when the additional grant of four sections is to be obtained unless it means to include the grant of 1865 in the lands in place of which lieu lands may be taken. And the only possible manner by which the extension of the grant can be brought within any directions for its ascertainment is by treating it as an extension of the grant of six sections in place to ten, accompanied, as the Court said in the Barney case, *by the right to select indemnity lands within twenty miles of the road* under all the limitations prescribed by section one of the act of 1857, as amended by the second section of the act of 1865.

Not a single word of this Court, in the decision of this case, when it had its attention drawn to and was deciding this precise question, is inconsistent with this view, but is inconsistent with every other.

A critical examination of Judge Miller's opinion in *St. Paul Railroad Co. vs. Winona Company*, 112 *U. S.*, in connection with what has already been settled in this case, shows that Judge Miller did not hold, nor intend to hold, that lieu lands could not be selected to supply the place of these to be selected by the Secretary within coterminous limits, to fill the four-section grant, under the act of 1865. On the other hand, if his decision is wrung from its connection with the case he was deciding, and distorted so as to be made to apply to the altogether different question presented in this case, it contains a distinct affirmation that lieu lands may be selected, beyond coterminous limits, to supply deficiencies in the four-section grant existing within those limits.

To understand both the opinions of Judge Miller and Judge Field, reference may be had to what had already been settled in this case, upon which the decree below was not reversed but impliedly affirmed. The case was heard first before Judge Dillon who decided three points.

First. That deficiencies might be selected in lieu of lands lost to the four section grant by reason of lands having passed to the Central Company, (construing the

proviso of the third section of the act of 1865 declaring that "all lands which may have granted, etc., which may be located within the limits of this extension, shall be deducted"). See *fourth head of Memorandum of Decision, page* 694, *Original Record.*

Second. That, by virtue of the acts of 1865 and 1866, deficiencies in the construction of any ten miles of road, after the acts of 1865 and 1866, might be supplied from indemnity lands between ten and twenty miles of the road without reference to the coterminous principle; applying this to both the grant of 1857 and 1865.

See *fifth Head, page* 695, *Original Record.*

Third. That, under the act of 1857, indemnity lands could not be selected to supply deficiencies existing at and prior o the date of that act; but upon this point he ordered reargument.

See *6th Head, Page* 695, *Original Record.*

The case coming on before Judge Miller for final hearing, the Judge only considered and decided the point reserved for reargument, and held that indemnity lands under the act of 1857 could be selected in lieu of deficiencies existing at and prior to the date of that act, and that, in the selection of these indemnity lands, there is no restriction to coterminous sections of twenty miles, (refer-

ring to the act of July 13, 1866,) and said, "I think the other questions were settled by Judge Dillon."

Page 790, *Original Record.*

The case coming on to be heard in this Court, Judge Miller's decision was affirmed, and Judge Dillon's reversed, *only* as to that part which held that indemnity lands could be selected in lieu of lands taken by the Central road.

Now, remembering what Judge Miller had held in this case, apply the language used by him in the case of St. Paul Company vs. Winona Company. He is treating of the act of 1865 and the grant by it, viz.: the four-section grant, and his language has reference to the point in judgment, viz.: that there must be a selection, and that the Winona Company having made one and the St. Paul Company not, the former had the better right. All that he says which has any reference to the right to indemnity lands in lieu of sales and pre-emptions under the act of 1865, comes next. He says: "the act of 1865, which is to be considered *in pari materia* on this point, (viz.: with the act of 1857,) provides that these lands shall be indicated by the Secretary of the Interior. What this word "indicated" means, may admit of some doubt, but taken in connection with the other two statutes, (viz.: the act of 1857, which authorised, as amended by the act of 1865, selection of indemnity lands within twenty miles, and the

act of 1866, which declared that the coterminous principle should not apply to lands taken to make up deficiencies,) and other acts granting lands to aid the construction of railroads, it probably means no more than what is expressed in the act of 1857, namely, *that the selection of lieu lands shall be made by the Governor or his agent and approved by the Secretary.*"

He had already held in the case at bar that, under the act of 1866, indemnity lands under the act of 1857, or lieu lands could be taken beyond the coterminous sections; and he now declares that the act of 1865, when read in connection with the acts of 1857 and 1866, it being in *pari materia*, means the same thing as to the lands under consideration, viz.: the increased grant.

Loose sentences, segregated from their connection and the point in judgment, have probably seen the cause of more litigation than all other causes combined; but when read, as they were intended to be, in the connection in which they were used, we reach a result in which the letter and spirit of the land grants and the decisions of this court are in perfect harmony.

The words, "said lands granted, shall in all cases be indicated by the Secretary of the Interior," is a phrase applicable to all land grants, and not significant in ascertaining whether there are indemnity limits under the act of 1865.

Upon the principle that that is certain which is capable of being made certain, when a map of definite location is filed, the grant is said to attach to the then vacant sections within six, ten or twenty miles of the road, as the case may be. But something more is necessary, in the administration of the land grant acts. A nice mathematical calculation is required by the erection of perpendicular lines to the line of location as laid down on the map, for the purpose of ascertaining just what sections, and parts of sections, lie within the proper distance from the located line; and land limits, accommodated to the sinuosities of the located line, are then to be fixed and laid down on the map. All this is the business of the Secretary, and it is thus that the administration of the land grants is conducted. The specific sections falling within the grant have to be "indicated" by the Secretary. Either Judge Miller's intimation, that the language in the act of 1865 referred to the selection of lieu lands, is correct, or the language has the significance above indicated. In neither case could any argument be drawn from it that there were not both place and indemnity lands under the act of 1865. We have, perhaps, dwelt to an unreasonable extent upon the first assignment of errors, to show that the right to select lands within the indemnity limits to make up the four-section grant, was a right which appertained to that grant and that it was so administered by the land department.

II. A.

This brings us to the third assignment of error, viz.: If the language of the proviso to the third section of the grant of 1865 is to be taken more literally than we have conceived, and so as to require a deduction of all lands which had heretofore been granted to the Central Company, "which lands may be located within the limits of this extension," whether the Winona Company took any in place of them or not, then, what are the limits of the extension of the grant. We take up this assignment out of its order, as it can more conveniently be discussed here, reserving the consideration of the second assignment for a later portion of the argument.

The Court below treated the limits of selection as the equivalent to "limits of this extension," which are the terms used in the proviso, and deducted all the lands passing to the Central Company within all the limits of the Winona road outside the original six-mile limits of the grant of 1857.

If the decision in *Wood vs. Railway Company*, 104 *U. S.*, is applicable here, the grant of ten sections per mile fixed the limits of the primary grant, and if our contention under the preceding head as to the true construction of the acts of 1857 and 1865 is correct, the same conclusion must

be reached. The original grant was limited to a tract of country six sections or miles in width, on each side of the located line, and the limits of the extension lie between the six-mile limit and the ten-mile limit fixed, *ex vi termini*, by the increase to ten sections per mile; the selections of the Secretary beyond that being for deficiencies.

Under this construction, the language "any lands granted," is confined to lands in place or granted lands of the Central Company; and the lands to be deducted are those only within the six-mile limits of that road, and the limits of the extension are the six and ten-mile limits of the Winona Company. The special report of the masters, accompanying the modified decree appealed from, shows this to be about fifteen thousand acres.

In our third point, we have discussed this question, and have contended that the lands granted, which are to be deducted from the Winona grant, are the lands only which lie within the six-mile limits of the Central road, and have sought to support that contention, by calling the attention of the Court to the fact that the lands selected for deficiencies, between the six and fifteen-mile limits are selected, (there being no coterminous principle under the act of 1857,) for deficiencies which occurred on other parts of the Central road. These lands, so selected, stand in place of and represent the specific grant coterminous with other

portions of the road. To allow these lands to be deducted from the coterminous grant to the Winona road by the act of 1865, would be to permit the Central to throw its losses, occurring on other portions of its line, into the conflicting limits, and cause them *all* to be deducted from the Winona grant within these limits. If we are correct in our contention that only lands within six-mile limits of the Central are to be deducted, then, it was the grant of 1857, which Congress had in view in both clauses of the proviso. This construction fixes the limits of the original grant to the Winona Company as also the six sections on each side of the road; and the extension commences at its outside limits, and extends laterally until the outer bounds of the four sections are reached. If not found there, the Secretary may go further; but it is in pursuit of lands to supply deficiencies within these limits. These lands may be thus selected by the Secretary outside the ten-mile limits. Either the act of 1865, as we have seen, broadened out the original primary grant from six sections to ten, and required the Secretary, first, in making his selections, to indicate those within ten miles, and permitted him, by virtue of the amendment of the proviso of the act of 1857, to select, for indemnity, any alternate sections within twenty miles, or there is no warrant for limiting his selection to twenty miles. This is the only clause which in any way mentions twenty miles as a limit, and that expressly de-

clares that it is an indemnity limit, and the lands to be taken within it are in lieu of those which the United States has sold, or to which pre-emption rights have attached, prior to the location of the road, (extended by the act of 1866, to land which the United States have disposed of prior to the withdrawal under the act of 1865).

If we are right in this, the limits of the extension are unquestionably between the six and ten-mile limits of the Winona road. If we are not right, there are no limits of the extension unless possibly the boundary lines of the state, in which case the entire road and all its lands of the Minnesota Central, which runs north and south, would be within the Winona limits. The result would be that the entire grant of 1857 in aid of the Central Company must be deducted from the new grant to the Winona road, and the entire grant of the Winona road, by the act of 1857, must be deducted from the extension grant to the Central Company, which would wipe out this entire extension to both companies.

But the Court below, following in that regard the decision of this Court, treats the original grant to the Winona Company as being located within six miles on each side of the road. That, then, is the thing originally granted, and the extension must lie beyond it and next to it, or it has no limit whatever.

But the Court below, deeming that this Court had rejected all of our contention embraced in the foregoing argument, and that the limits of the extension must be sought elsewhere than in the belt of country comprising the four sections adjoining the original six, could see no other alternative than that of treating the extension as a float without defined limits, but which vibrated between the six and twenty-mile limits, as it termed them.

We have already seen that the instant the grant is cut asunder from that of 1857, and viewed as an original and independent grant, there are no twenty-mile limits.

But suppose there are. If the extension was not from six to ten, what was it? and where was it? It is idle to say that the limits of selection are the limits of extension. The extended grant does not embrace all the lands within the six and twenty-mile limits, any more than it would embrace all the lands in the State, if there were no lateral limits. If a grant is made of four sections per mile along and opposite a railroad with no lateral limits, (and we are not without precedents of grants of that nature,) and should declare that all lands previously granted, which lie within the limits of the extension, should be deducted, the first criticism upon it would naturally be that the term "limits of extension" was inappropriate to such a grant, and if it meant anything, that it meant that the Secretary,

in making his selection, must not select any which had previously been granted to another company.

Mr. Justice Field says, in the opinion in this case, that the clause requiring the deduction, means no more than the law would have implied without it. Property previously conveyed would not pass under such a grant, but, in the absence of such a clause, the law would have implied simply that the Secretary, in making his selections, must pass over any lands previously granted. It certainly would not mean that if he passed them over, and found other lands not previously granted within the State, and selected them, that the lands previously granted must be deducted from the lands selected.

It remains to note one clause in the opinion of this Court, which will be urged as limiting the selections of the four sections additional under the act of 1865 to coterminous selections.

Judge Field says, *page* 628, 118 *U. S.*, in considering the meaning of the word "quantity" in the act of 1865: "As to them the grant may be regarded as one of quantity, although the coterminous principle applies to them, and they are to be situated along and opposite to completed road."

To understand this, we must remember what part of the decision of the Circuit Court Judge Field was considering

and reversing. It was that part of Judge Dillon's opinion, in which he held that for lands lost to the Winona Company, by reason of lands previously granted to the Central Company, the Winona could select lands outside of and beyond the coterminous limits. This could only be supported on the ground that the increased grant was by "quantity" instead of description.

The authority given to select lieu lands was confined, by the terms of the acts of 1857 and 1865, to selections in lieu of those lost by *sales and pre-emptions*. The right to make such selections, outside of ten and within twenty miles of the line, in lieu of lands sold or pre-empted, Judge Dillon had sustained, and that part of his holding this Court did not disturb. But he held also, that the lands previously granted to the Central Company created a deficiency which might be supplied as other deficiencies. This could only be because the grant of 1865 was one of quantity, and this Court, in reversing that holding only, admitted that the grant was by quantity, but the selections by the act of 1865 must be made along and opposite completed road. The scope and effect of the word "quantity" was thus limited by the coterminous principle applied by the same act. As to deficiencies caused by sales and pre-emptions, the coterminous limits were removed by the act of 1866. Judge Field was not considering the right to

select indemnity lands for deficiencies caused by sales and pre-emptions, but only for lands previously granted to the Minnesota Central. The act of 1865, being by quantity, would have authorized the Winona Company to select enough land to make a full grant of ten sections to the mile, in lieu of those taken by the Central Company, if it had not at the same time limited such selection to coterminous lands, and there being no coterminous lands vacant, deficiencies, caused by lands actually taken by the Central Company, necessarily could not be supplied elsewhere.

II B.

If we are in error in supposing that the "limits of extension" are to be sought in the belt of lands lying outside the six and within the ten-mile limits of the Winona grant, then, they must be found in the belt of lands lying outside the fifteen and within the twenty-mile limits.

It seems to us that there can be no alternative position, logically, than to hold that, either there are some definite and fixed limits to this four-section grant that somewhere on the map of Minnesota can be found a strip of land four sections wide, on each side of the road, in which the increased grant is contained and by whose limits it is

bounded, or else, that those limits are uncertain at the date of the act and only become fixed on the selection of the Secretary. If the latter, it can never be known whether any lands of another company will be located within the limits of the extension of the grant until those limits are ascertained by the selection of the Secretary. If he can and does make such a selection as to avoid interference or collision with a previous grant, he may do so, and there can be no deduction, because no lands of that character lie within the limits as bounded, fixed and defined by his selection.

Treating the limits of the extension, as the Court below does, as equivalent to the limits of selection by the Secretary, it is not within the limits within which he might make his selection, but the limits within which he actually did make it that the lands to be deducted must be located. The limits of the extension, under such a construction, are and can be only determined by the actual selection of the Secretary. If the Secretary had selected any lands, which had, prior to the act of 1865, passed to the Central Company to fill the Winona Company's four section grant, or had selected other lands in lieu of them, it might be said that these lands lay within the limits of the extension as fixed by the Secretary, for he fixed the grant upon them primarily by selecting lieu lands in their place.

But he did not select an acre of land in lieu of them. How then can it be supposed, if the limits of the extension grant are to be fixed by the Secretary's selection, that any lands granted to the Central Company are located within the limits of the extension? Hence there is and can be no deduction; they have been withdrawn from our grant by our omission to take them or other lands in their place. To deduct the amount now from our full grant would be equivalent to a double deduction. But the Court below has adopted the most illogical, inconsistent and untenable theory that the case admitted of, in holding that all lands in place and indemnity limits, or within both the six and fifteen miles of the Central road shall be deducted from all lands outside of the six and within the twenty of the Winona road, if the former were located within the latter limits.

Now, both of these holdings cannot be right; they are illogical, inconsistent and cannot stand together.

If the terms "any lands granted," in the proviso, include both six and fifteen mile limits, then, within the meaning of that proviso, the original grant of 1857 includes a belt of land fifteen miles wide on each side of the road. But if it does, the limits of the extension of the grant are to be sought for outside of those limits, to-wit: outside the fifteen and within the twenty. Congress can-

not be supposed to have adopted one construction for the lands to be deducted and another for those out of which the deduction is to be made.

The Winona grant under the act of 1857 was included within six-mile limits. The Central grant, under the same act, was included within fifteen mile limits. So holds the Court.

The Court below burns the candle at both ends; it holds that the lands granted to the Minnesota Central for the purpose of deduction from the Winona grant are bounded by the fifteen mile limits, while, *uno flatu*, it holds that the lands granted by the act of 1857 to the Winona Company are bounded by the six-mile limits, and all outside of those limits is included in the extension, from which all of the Minnesota Central lands, bounded by both its six and fifteen mile limits are to be deducted.

If the Court is right in holding that all lands within the fifteen mile limits of the Minnesota Central line, which passed to that company under the act of 1857, are to be deducted, which are located within the limits of the extension to the grant to the Winona Company, then it plainly is *not* right when it declares that all such lands of the Central Company, which are located between the *six and twenty-mile limits* of the Winona Company, are to be deducted from the latter's lands. If the "*lands granted*" by the act of 1857, to be deducted, mean all the lands which

might pass by selection under the act, as well as those primarily granted, then the original grant, for the purposes of this proviso, is to be sought within the fifteen-mile limits. But the proviso did not intend one measure for the lands to be deducted, and another for the lands out of which the deduction should be made. When we have ascertained what the proviso meant in one branch, we have the key to its meaning in the other. Under this interpretation, the moment the Court finds that the terms "*lands granted*" are not used in their narrowest and restricted sense, but in a broader and looser sense, including all lands which might directly or indirectly, by primary grant or secondary selection, pass under the act of 1857, then, for the purposes of the proviso, that is the grant, and its limits are fifteen miles on each side of either road. If the original grant of the Central Company, which is to be deducted, is bounded by the fifteen-mile limits of that road, the original grant of the Winona Company, it logically follows, was also bounded by its fifteen-mile limits. The extension by the act of 1865 must be sought, therefore, beyond the limits of the original grant; for within them there cannot be said to be an extension. Hence, under this construction, it must lie outside the fifteen and within the twenty-mile limits of the Winona Road, and this is in accord with the practical working of the act of 1865 in its connection with that of 1857. The

grant of 1857 absorbed all lands within both the six and fifteen-mile limits of both roads, and threw the new grant into the space between the fifteen and twenty for its enlarged or extension limits.

If the lands to be deducted from the extension of the Winona grant include the lands granted by the act of 1857, lying outside of the six-mile limits of the Central Company, and if the limits of the extension embrace all between the six and twenty-mile limits, why are not the lands between the six and fifteen-mile limits of the Winona Company, which passed to that company under the act of 1857, also to be deducted? They come precisely within the letter of the proviso of the act of 1865, if similar lands granted or passing to the Central Company do.

The language is, "*any lands which may have been granted to the territory or state of Minnesota for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant, shall be deducted from the full quantity of land granted.*" If the space outside the six and within the fifteen mile limits of the Winona Company is meant to be included in the terms of the proviso, "located within the limits of this extension," then, the lands granted by the act of 1857 to the Winona Company within those limits must be deducted, as

well as those of the Central Company. So that Congress, while gravely asserting intention to increase the original grant from six sections per mile to ten, has either fraudulently or stupidly thwarted and circumvented its professed intent, by, in the same breath, authorizing a deduction from the extended grant of the larger portion of the lands which composed the original grant.

Outside the fifteen and within the twenty-mile limits of the Winona Company, the language of the proviso can have full effect upon such lands of the Minnesota Central as lie between those limits, without producing this absurd result, as, of course, there are no lands passing under the act of 1857 to the Winona Company between its fifteen and twenty-mile limits, because that is the extension of its grant, namely, the new area of lands granted. Webster defines "extension," as enlargement of breadth, or continuation of length; the lands to be deducted must be situated within the enlargement in breadth of the grant of 1857. Where is this enlargement, assuming the fifteen mile belt to be the grant of 1856, but in the region bounded by a continuation in length of the perpendicular lines to the line of road which measure its fifteen-mile limits? These are continued, in length, from a point fifteen miles distant on a line perpendicular to the located line of the road to a point on the same line twenty miles distant from the located line of road.

We have attempted to show the inconsistency of the holding of the Court, for the purpose of deduction, that the original grant is fifteen miles wide, and at the same time holding that the same grant was only a grant of lands within six-mile limits, for the purpose of extension. But, if the Court were wrong in holding that the grant of 1857, for the purpose of deduction, was of all the lands passing under it by selection, as well as by the direct action of the grant, and if it be true that only lands within six miles of the Minnesota Central be deducted, still the absurdity of holding that the extension embraces all the land outside the six and within the twenty-mile limits of the Winona road would be apparent. Under that construction, all lands passing to the Winona road by virtue of the act of 1857 as well as those to the Minnesota Central, would be embraced by it. So that while Congress with one hand was extending a donation in the shape of an additional grant, it was cutting it down with the other by deducting a large portion of the original grant from the fallacious extension. If the act of 1865 is to be regarded as a grant of ten sections instead of six, and the deduction was to be from the enlarged grant, and was intended simply to prevent a construction whereby the companies would get more than ten sections, or ten sections in addition to the original six, by providing that the lands granted to *the same company* by the act of 1857 should be deducted from the full quantity

of lands granted, and did not apply to lands of another company, such deduction would be intelligible. Such was our contention as to the meaning of the proviso when the case first came before the Court; but that contention did not meet with favor. The Court held that the reservation of lands previously granted to Minnesota was from the grant of the additional four sections, that is, from the extension of the original grant of 1857.

See *Page* 628, 113 *U. S., Winona & St. Peter Railroad Company against Barney.*

If the deduction is to be from the additional four sections, it cannot be that any of the original six granted by the act of 1857 to the same company are to be deducted. The Court so held by excluding the lands within the six-mile limits of the Winona company from the extension. But there can be no possible difference between permitting the substituted sections, selected within the fifteen-mile limits of the Winona company, to be substracted from the additional four sections, and permitting the original six sections to be substracted. It is not contended that either can be substracted; but if the limits of the extension embrace the lands lying between the Winona Company's six and fifteen-mile limits, then, its lands, passing to it under the act of 1857, come equally within

the phraseology of the proviso as those of the Central Company.

But the Court below arrived at the conclusion, that all outside the six and within the twenty-mile limits of the Winona Company were embraced in the extension, and that that was the extension, because this Court, in its opinion already referred to, says: "the four sections are to be selected by the Secretary of the Interior, beyond the six and within the twenty-mile limits, and that where the grant previously made to Minnesota to aid in the construction of the Minnesota and Cedar Valley Railroad, [Minnesota Central,] interferes with the extension of the grant to the Defendant, by the act of 1865, the extension must be abandoned."

But outside the six and within the fifteen-mile limits of the Winona road, its own prior grant interferes with the grant to it of 1865. The Minnesota Central grant of 1857 interfered with the Winona grant under the same act. Where the Central's lands in place came between the six and fifteen-mile limits of the Winona road, the former took them all. Where the Central's indemnity lands, or lands between its six and fifteen-mile limits, coincided with the Winona Company's six and fifteen-mile limits, under the act of 1857, each took an undivided moiety. So that it is not correct to say that, within these limits, the grant of 1857, to the Central Company, interfered with the grant

of 1865 to the Winona Company. It interfered with the grant of 1857 to the Winona Company, whose grant within those limits alone interfered with its own grant of 1865. The only point where the grant of 1857, to the Central, interfered with the Winona's additional grant of four sections, was where the lands of the former were embraced in the extension limits outside the fifteen and within the twenty of the Winona Company.

True, the Secretary might select the additional four sections anywhere outside of the six-mile limits of the Winona Company; but that Company had the right, in defiance of his selection, to come into its original indemnity limits, outside the six and within its fifteen-mile limits, and select every alternate odd section, to make up deficiencies occuring elsewhere along its line. It is notorious that for the first fifty miles from Winona westerly there were practically no lands. Eleven thousand acres the record shows for fifty miles from Winona to Rochester, built prior to the act of 1865, under the act of 1857. To make up these deficiencies it had the right to, and did range along its entire indemnity limits, far beyond and westwardly of the lands in dispute. It is idle to say, therefore, that the Minnesota Central interfered with the extension of the Winona Company within these limits, while the latter's largely deficient grant interposed a bar-

rier, by its own interference, against any interference by the Central Company's grant.

But the language of the proviso cannot be satisfied by treating, for the purpose of deduction, the grant of the additional four sections as a float, which the Secretary of the Interior might select from a belt of fourteen miles in width, comprised within the six and twenty-mile limits. This space would contain three and one-half such grants, supposing the whole to be vacant and no sales or pre-emptions existing within it; and the Secretary, if not confined to the belt nearest the road, might select which he chose. The Court below held that because he had his election to select either of these belts, all should be deducted, or three and one-half times the amount of the additional grant within the conflicting limits should be deducted, because he had those limits to select from. But the language of the proviso confines the deduction to lands which *may be located within the limits of this extension*, not within the limits of the Secretary's right of selection. The extension is a definite thing, "four sections," and the language of the proviso indicates that it is susceptible of fixed limits, that is, of being defined by metes and bounds. The limits of *selection* of the extension, certainly, are not the limits of the extension; otherwise, in a supposable case of the entire limits being vacant and so passing to the railroads,

several times more lands would be deducted than the amount of the entire extension. It is idle to say that when the whole additional grant for that section is exhausted the deduction must stop. What would have been the object of Congress in making such a provision? It, certainly, was not its intent to make provision for the deduction of land within a certain locality where there might be several times as many similar lands as there could possibly be lands from which the deduction was to be made. It would have excepted such a territory from its grant, but the term "deducted" would not have been used.

The Court below, by the broadest possible construction against us which could be made, has deducted from our grant an enormous quantity of lands, which will astonish this Court, and even astonished the Court below, I think, when the report of the Masters came in. The result, of itself, would cause us to pause, and carefully examine the basis upon which such results were possible. Some fixed and definite limits which are, in fact, an extension of the original grant, must be found to satisfy the language of the proviso. Assuming that the fifteen-mile limits were the bounds of the original grant, as the Court below does, and that all lands lying within those limits and passing to the companies under the act of 1857 were "granted lands" to be deducted, then, this extension of the grant and its limits, can only be found in the territory lying beyond

and outside of the original grant, and within twenty miles of the line of the Winona Road.

III.

What description of lands are *to be deducted?* Are they the lands in place, or "granted lands," of the Minnesota Central Company, or does the language "*any lands which may have been granted*" to the territory for the purpose of aiding any railroad, include such as the Central Company might acquire by selection in lieu of those granted, viz.: those passing to it between its six and fifteen-mile limits, as well as those within its six? Our contention is that it applies only to lands directly granted by the act of 1857, and located within the six-mile limits of the Central Company. The language is "*any lands which may have been granted*" and which may be *located* within the limits of this extension, not, may be *selected* by the company, but may be *located* (i. e. by the grant,) within the limits of the extension. We strenuously object to the laxity of construction which chases a floating grant, with no fixed limits, through a large range of country, and finally ends by running a survey around the whole territory through which it pursues its flight. We equally object to the same laxity which forsakes a construction which has for its ba-

sis a definite and certain description, made so by the definite location of the line of the road, and adopts, in its place, a possible selection only to be made certain by the exercise of the will of an agent of the government in certain contingencies which may never arise.

In the construction of the land grant acts, "granted lands" and "indemnity lands" have come to have a fixed place in the nomenclature of the courts and the departments. "*Lands granted*" are those within the primary limits, frequently designated as "*lands in place*," and which are made certain on the filing of the map of definite location, the title then vesting and relating back to the date of the act.

Lands to be *selected* do not become the property of the company until actually selected, and, when so selected, the title vests from the date of the selection, and not from the date of the act by which the selection is authorized.

Ryan vs. Railroad Company, 99 *U. S.*, 382.

Grinnell vs. Railroad Company, 103 *U. S.*, 739.

Kansas Pacific vs. Atkinson R. L., 112 *U. S.*, 414.

Cedar Rapids & C. Railroad vs. Herring, 110 *U. S.*, 27.

From these citations it is very clear that there is a broad distinction between the two classes of lands, and that it by no means follows that, when Congress speaks of any lands "*heretofore granted*," it refers to anything else than those which pass by force of the grant, and are capable of being identified by the location of the line. Those only have that fixed certainty which is indicated by the use in the proviso of the words "*located within the limits of this extension.*"

The authority to select the lieu lands, it is true, is derived from the act of Congress, but the title is vested not by force of the act as a grant, but by the selection of the company or the agent of the state and the approval of the Secretary of the Interior.

As was said in *Missouri etc., R. R. Co., vs. Kansas Pacific Railroad Co.*, 97 *U. S.*, 497, "To the validity of such transfers it may be admitted that there must exist a present power of identification of the land, and that, where no such power exists, instruments with words of present grant are operative, if at all, only as contracts to convey."

So that it by no means follows that in the use of the terms, "*any lands which may have been granted to the territory*," Congress, in the act of 1865, intended to embrace a float which might or might not become vested by selection *in pais*.

But, if we seek for the key of construction in the spirit

rather that the letter, we still fail to find any justification for the deduction of indemnity lands. Congress meant to deduct from each section of the new grant such lands as lay within and appertained to that section.

This Court says in its opinion in this case (*Page* 628, 113 *U. S.*) "These words (referring to the words of the proviso to section 3 of the act of 1865,) do not transfer the loss from the ten sections within which the grant falls to other sections along the line, the sections in which such grant falls are correspondingly reduced."

Each section must sustain its own losses, and, on the other hand, is entitled to the benefit of a full quota, if existing in that section, notwithstanding other sections largely deficient may come into the coterminous section and appropriate the indemnity lands there lying. No section can throw its losses upon another.

Now, suppose there were within the six-mile limits of the Minnesota Central road, located within the limits of the extension of 1865 to the Winona Company, (whatever those limits may be,) a full grant, that is,no lands had been sold or pre-empted before the rights of the company attached, *that* would have to be deducted from the Winona Company's additional grant. Now, suppose that likewise between the six and fifteen-mile limits of the Central road, also located within the limits of the extension to the Winona Company, there was a full grant, no lands having been sold or pre-empted before the rights of

the Central Company attached. Now, suppose, as would certainly be the case, (for the Minnesota Central grant was not half full,) that it came into these indemnity limits, and appropriated all the indemnity lands to supply deficiencies on the section of its road at the Iowa line, (there was no coterminous principle under the act of 1857. *Railroad Co. vs. Cartwright*, 21 *Wallace* 310). Must these sections also be deducted from the Winona Company's additional grant? These sections, when thus selected, stand in place of and represent the grant belonging to the section of lands in place, in lieu of which they are selected, and do not represent or stand in place of any lands granted to the Central Company which may be located within the limits of the Winona extension. There the grant of lands in place is full, and that is what actually did take place. True, the Minnesota Central's grant was not full at this point, but the company, starting from St. Paul and Minneapolis, passing through the oldest settled portion of the state, in the vicinity of those cities, struck none, or very few vacant lands until it reached these conflicting limits, and, supplying deficiencies, exhausted every acre for deficiencies on its northern end long before it came to make up deficiencies existing coterminous to the section where it crossed the Winona grant.

The learned, astute, and persistent counselor, who represents the Respondent, who was never known to claim less

than he was entitled to, thoroughly conversant as he is with the history and law of the Minnesota land grants, never entertained a suspicion that indemnity lands of the Minnesota Central, lying outside its six and within its fifteen-mile limits, where they crossed the Winona extension, could be deducted from it. Thus, he tersely states his claim on the last page of his brief in this Court, when the case was here before:

He says: "If the theory of the Appellees is correct, that the act of 1857 granted every alternate section, designated by odd numbers, for six sections in width on each side of the road, then there were within the grant of the former, (referring to the Central Co.) and the extension of the grant of the latter, (referring to the Winona Co.) viz.: within the six-mile limits of the former, and between the six and ten mile limits of the latter, 15,121 acres, and between the six-mile limits of the former, and the ten and twenty-mile limits of the latter, 17,329 acres, or in both, 34,450 acres. Appellant contends that that number of acres should be deducted from the grant to the Appellees for that section of ten miles, and that it would be inequitable, as well as opposed to the plain letter of the statute, to require the loss from the grant to be borne by the line west of Waseca."

This closes his argument and his signature follows: "Thomas Wilson of cousel for appellants."

But the Court below, by deducting, not only the loss

properly appertaining to that section, but all the indemnity lands taken within those limits by the Central Company to supply deficiencies elsewhere, have deducted nearly sixty-seven thousand acres from our extension. If it is inequitable to require the loss of the Winona Company from its grant, within the conflicting limits, by reason of lands taken by the Central Company, to be borne by the Winona Company's line west of Waseca, why is it not equally inequitable to require the section in controversy to bear a deduction, not only of the "lands in place" of the Central Company lying within it, but of all its indemnity lands lying within the extension, which were taken to supply the loss of and are substituted for and stand in place of lands granted to the Minnesota Central Company near St. Paul and Minneapolis.

If we are right in these conclusions, the Master's report shows that there are within the six-mile limits of the Central Road, which passed to that company under the act of 1857, and between the fifteen and twenty-mile limits of the Winona Road, about six thousand acres, and this should be the extent of the deduction.

IV.

But there is another view to be taken, already alluded

to. Suppose such a construction is given to the proviso in section three of the act of 1865, as to require some land to be deducted from the extension grant, notwithstanding that grant was filled irrespective of the lands taken for the Central Road, the question is how many should be deducted. The conflicting limits of the two roads, exclusive of the extension grant, were thirty miles each way. Four sections per mile across these limits would give 76,000 acres. The Circuit Court has deducted 66,987 acres. Now, the principal point decided by this Court was, that any deduction to be made must be *from coterminous lands received under the extension grant*. Under the act of 1865, no deficiencies could be selected except from, and coterminous with, completed sections of ten miles of road. Now, if the Winona Company did not receive, under the extension grant, *within the conflicting limits of the two roads*, 66,987 acres, that is, did not receive that quantity on its extension grant *coterminous to the thirty miles of conflicting limits*, then it is evident that the Circuit Court deducted too much land. Now, the fact is, the Winona Company did not get an acre of land on its extension grant lying actually within the conflicting limits, or coterminous to the road through those limits, nor within twenty miles of the Central Road. All of the odd numbered sections within those limits had been taken prior to March 3d, 1865, either by the two com-

panies to fill their original six section grant, or by pre-emptions. There was, therefore, nothing received by the Winona Company on its extension grant within those limits, from which to make any deduction. But under the authority conferred by the act of July 13th, 1866, the Winona Company did select land for its extension grant, within its indemnity limits, west of the limits of the Central road, in lieu of the lands taken by pre-emption within the conflicting limits of the two roads. But there is no authority for deducting any lands granted to the Central Road, from these deficiency lands thus selected by the Winona Company. The lands to be deducted, and the lands from which the deduction is to be made, must be coterminous with the same section of road. There is no authority to deduct from lieu lands which are not thus coterminous. The deficiencies, or lieu lands received by the Winona Company, are not thus coterminous, and were not received under the act of 1865, but under the act of 1866.

The extension grant of 1865, gave the Winona Company no lands within the conflicting limits of the two roads, because there were none there that had not already been taken. But the act of 1866 came in and practically made a further grant by allowing lands to be taken elsewhere to fill the extension grant, without any right of deduction therefrom.

V.

It has been urged by counsel for Defendant, and perhaps will be again, that there are not sufficient lands to fill the grant for the entire line of road, and that the whole deficiency should not be thrown upon the western division. The answer is, that the deficiency is thrown upon the western portion of the road by the Defendant's own action. The Defendant took the lands within the indemnity limits coterminous to the western portion of the road,and appropriated them, as authorized by the act of 1866, to fill the grant on the more easterly section of the road.

The road was constructed from the east westerly, and lands were selected within the indemnity limits in advance of constructed road, to fill the grant as the road was completed in the required sections of twenty and ten miles. Thus, for the completion of the road from Rochester to Waseca, the Defendant, under the act of 1866, selected and received lands within the indemnity limits west of Waseca, and appropriated the same to fill the grant of ten sections to the mile between Rochester and Waseca. This was in accordance with what was intended and contemplated by the parties when they entered into the contract, as is manifest from the language used. If the road had stopped at Waseca there would have been no

deficiency. There was no deficiency up to that point. As the construction of the road progressed west from Waseca the same course was pursued of filling the grant as the road was completed in sections of ten miles, whereby the indemnity lands were all exhausted before the road was completed to its western terminus. It is now too late for the Defendant to ask to have the lands reapportioned to its road, and especially this can not be done to the prejudice of the Plaintiffs.

GORDON E. COLE,

Solicitor and of Counsel for Appellants.

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Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 1221.

ASHBEL H. BARNEY, *et al.*,
Appellants.

VS.

THE WINONA & ST. PETER RAILROAD CO.
Respondent.

REPLY TO RESPONDENT'S ARGUMENT.

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REPLY TO RESPONDENT'S ARGUMENT.

We have but a brief reply to make to the argument of counsel for appellee. The learned counsel has not questioned the correctness of our statement of *facts*, nor has he attempted to refute the more essential parts of our argument. He seems, however, to have misapprehended us in some respects; and to make sure that our points and position are understood by the Court, we will briefly restate them.

I.

We admit, of course, that questions considered and decided on the former appeal cannot be reviewed on this appeal. But we seem to differ with counsel for defendant as to the core and pith of the former decision.

As we understand it, the only error found in the decision of the Circuit Court upon the former appeal was, in holding that any loss to the defendant from the extension grant of 1865, by reason of lands devoted to the *Central road* under the act of 1857, could be made up elsewhere within the indemnity limits; and the case was sent back with instructions to deduct from the decree so much land as had accrued to the Central road under the act of 1857, within the limits of the extension grant of 1865, so far as the decree charged the defendant therewith, or with lieu lands in place thereof. Such, we take it, is the scope and intent of the decision. For, if the decree did not in fact charge the defendant with any land acquired under the act of 1865 actually lying within the conflicting limits of the two roads, nor with any selected in lieu of those taken by the Central road, it is not to be supposed for a moment that this Court intended to order any deduction to be made. This Court merely corrected an error in the decision of the Circuit Court, but did not determine nor inquire as to whether or how the error affected the decree, but left the settlement of that matter for the Circuit Court.

Our views upon this point, *in extenso*, are found in our argument, pages 12 to 35, and need not be repeated here. We state in our argument, and show from the record, that the defendant was not charged in the decree with any lands under the extension grant within the conflicting limits of the

two roads, nor with any in lieu of lands taken by the Central road. We show that the extension grant within the conflicting limits of the two roads, was filled under the act of July 13, 1866, by the selection of indemnity land beyond the conflicting limits, *in lieu of lands pre-empted* within those limits, and not in lieu of lands taken by the Central road ; *and our statements and argument in these respects are not refuted or questioned by the counsel for defendant.*

We say then, that the error in the *decision* of the Circuit Court which was corrected by this Court, did not enter into the decree, and that upon the admitted facts, the principle involved in the decision of this Court does not require or authorize any deduction from the original decree.

And in this connection we make the further point, that it is wholly immaterial whether the extension grant be regarded as one of quantity, or of lands in place, or what are its legal limits.

The questions are how was it interpreted and administered by the land department, and what quantity of land did the defendant actually get under its extension grant as appertaining to its road within the conflicting limits, or between Rochester and Waseca ; and did it get any land under the extension grant coterminous to its road within the conflicting limits, or any in lieu of lands which had accrued to the Central road ; for, if not, the principle decided by this Court would not require or authorize any deduction from the original decree. The record shows how the acts of Congress were interpreted and administered by the land department, and in what manner, and the quantity of land acquired by the defendant under the extension grant within the conflicting limits of the two roads. It shows that the extension

grant was interpreted and administered as simply widening out the original grant from six to ten miles, with indemnity limits between ten and twenty miles. It also shows that the act of July 13th, 1866, was interpreted and administered as allowing the defendant to select lands within the indemnity limits in advance of constructed road, in lieu of lands taken by pre-emptors within the conflicting limits of the two roads, to fill the extension grant within those limits, and the lands were so selected, and the extension grant so filled between Rochester and Waseca, and that the defendant actually got the lands.

In addition to the references to the record in our argument in chief, we call attention to the instructions of the Land Commissioner on page 677 of the Record.

In such cases this Court will follow the interpretation given to a land grant by the land department.

United States *vs.* Burlington R. R., 98 U. S., 341.

But whether so or not, and whether the land department correctly interpreted the extension grant of 1865, and the act of July 13, 1866, is immaterial in this case. Those acts actually received an interpretation and construction under and pursuant to which the defendant received and holds the lands. And the defendant contracted with the plaintiffs to convey to them the lands which it *should receive* as appertaining to its line of road from Winona to Waseca. This is repeated two or three times in the contract, and the whole instrument shows that the intention was that the plaintiffs should have all the lands, estimated at about 600,000 acres, as appertaining to its road between the above named places. The defendant, having actually received the lands, cannot now escape from the obligation of its contract upon the plea that

it got them under an erroneous construction of the Acts of Congress by the land department, there being no objections on the part of the Government to such construction.

Under the construction of the Acts of Congress and the administration of the extension grant by the land department, the defendant filled its extension grant within the conflicting limits of the two roads by selections west of those limits, and within the indemnity limits, in lieu of lands pre-empted within the conflicting limits and within the limits of the extension grant; and the defendant actually received and holds the lands. The original decree charged the defendant with these lands, and ordered them to be conveyed to the plaintiffs under the contract. Had the defendant received lands under the extension grant coterminous with its road within the conflicting limits, or had it received lands elsewhere in lieu of lands taken by the Central road, the question of deduction under Section 3 as interpreted by this Court, would have arisen. But as it received no such lands, and is not so charged in the decree, the question of deduction under said Section 3 has no application. This Court did not decide nor intend to decide that there should be any deduction from lands selected to fill the grant in lieu of lands taken by pre-emptors.

And in this connection we also call attention to what we have said under the IV. head of our argument, page 58.

II.

If it is necessary to determine definitely the limits of the extension grant, then we say in the second place, that such limits, in the sense of that term as used in section three of the act, are between six and ten miles of the road.

In the opinion of the Court in this case upon the former appeal, it is said that the lands are to be selected between six and twenty miles of the road. But this does not define the limits of the grant unless they are co-extensive with the limits or right of selection; in which case, the grant would be thrown fifteen miles from the road. For the right of selection to fill the original six section grant extended to fifteen miles from the road, and if the limits of a grant are co-extensive with the limits of selection, then the limits of the original grant extended to fifteen miles from the road, which would necessarily throw the extension grant outside those limits.

The twenty miles limit is only found in the proviso of section one of the act of 1857, as amended by section two of the act of 1865, and only fixes the outside limit for the selection of indemnity lands. While, therefore, the lands are to be selected beyond six and within twenty miles of the road, the selection must first be confined between six and ten miles, with the right to make up deficiencies between ten and twenty miles, that being expressly defined as indemnity limits.

The proper limits, therefore, of the extension grant, as that term is used in section three of the act are between six and ten miles of the road. Such was the construction of the act, as we have seen, by the land department, and the grant was so administered. This does not militate against the statement that the lands are to be selected beyond six and within twenty miles of the road.

Furthermore, this statement in the opinion of the Court that the lands are to be selected outside of six and within twenty miles of the road is mainly argumentative in reach-

ing the main point of the decision, viz.: that lieu lands could not be selected in place of those which had accrued to the Central company.

The discussion, when the case was here before, of the construction of the act of 1865, was confined to the right to select indemnity lands, outside of coterminous limits in lieu of lands *sold or pre-empted* within ten miles of the road, and the contention of the present appellants in that regard was sustained, or, at least, the decision of the Circuit Court in that respect was not reversed.

The present appellants also claimed that they were entitled to a full grant of ten sections per mile, and to select lands, beyond coterminous limits, in lieu of those taken by the Minnesota Central company. The Court held that they *were not*, and reversed the Circuit Court in that particular only. All said by Judge Field, on that branch of the case, is confined to that question. We do not seek to open the discussion on that point. But, whether any, and, if any, how many lands, are to be deducted under that holding was left to be determined by the Circuit Court.

If the Winona Company, under that decision, took lieu lands by virtue of the act of 1856, anywhere along its line west of Waseca, in place of lands *sold* or *pre-empted* within ten miles of its road, then, the ten-mile limits, to which the original grant was extended, are the limits of the extension.

If the grant of the additional four sections by the act of 1865 was a grant by "quantity," still, *ex vi termini*, it fixed the bounds of the grant at the outer limits of the ten sections, to which the grant was increased; and selections outside of that were for indemnity.

In either case, the limits of the extension lie between the original six-mile limits and the ten-mile limits to which the grant is increased.

The use of the term "ten-mile limits," to which every land-grant lawyer has become habituated, in the administration of these grants, is strikingly illustrated in the counselor's brief. What are the ten-mile limits of which he speaks? What do they limit, if not the four-section grant of 1865?

The limit of twenty miles is fixed by the amended proviso of section 1 of the act of 1857, by limiting the right to select *indemnity* lands, and those only, to twenty miles from the line of the road. If that proviso does not apply to the four section grant, then that grant has no lateral limits. If it has none, the limits within which the four sections may be selected, are the North and South lines of the State, which would include the entire grant to the Minnesota Central road under the act of 1857; and the limits of selection of the four section grant of the Minnesota Central, likewise, being defined only by the East and West lines of the State, would include the entire grant of the Winona road. Under this construction, the entire extension grants of both roads would be extinguished.

III.

If the limits of the extension grant are not between the six and ten miles of the road, then they must be between 15 and 20 miles of the line of the road, and such was the holding, or involved in the ruling, of the Court below. By that ruling the limits of the original grant to the Central company are allowed to be fifteen miles, that is, coextensive with the limits of selection; and upon the same principle

fifteen miles must also be allowed as the limits of the original grant to the Winona company. This, as before stated, would throw the extension grant beyond those limits, or between fifteen and twenty miles. Within the limits of fifteen and twenty miles of the Winona road, the extension grant would only be interfered with by the original grant to the Central company, whereas between six and fifteen miles the extension grant would interfere with the original grants to both companies.

The counselor for respondent lays great stress on the words of this Court, that, "where the Minnesota Central grant of 1857 interferes with the extension, it must be deducted." But, within the fifteen mile limits of the Winona road, it did not interfere. The counselor says—"if it had not taken the lands within those limits, the Winona company would have taken them for its extension grant." Not so. If the Central had not taken them, the Winona company would have done so to make up deficiencies in its grant of 1857; and that grant would, and did, interfere with, and prevent, its getting *any* portion of its extension within its fifteen mile limits.

Why should the lands taken by the Central company within 15 miles of the Winona road be deducted, any more than the lands taken by the Winona company itself, under its original grant, within the same limits? As before said, the Winona company did not get an acre of land under its extension grant within 15 miles of its road and within the conflicting limits, nor an acre in lieu of lands which had been taken by the Central company within those limits.

IV.

If the limits of the extension are not between the six and ten-mile, nor between the fifteen and twenty mile grant, they are uncertain, and remain so until fixed by the selection of the Secretary. When the selection is made, *that* determines the limits of the extension. If he selects lands within the conflicting limits of the grant to the Central company, or lieu lands in place of lands granted to that company, *that selection* fixes the limits of the extension. But, if he does not make any such selection, then no lands of that company lie within the limits of the extension, and no deduction should be made.

V.

When the limits of the extension grant are determined, the next inquiry is, what lands within those limits were granted to the Central company by the Act of 1857. These are only lands within the six-mile limits, or lands in place of the Central company. If the grant to the Central company had been filled with lands in place, that company would get its full grant within the limits of the extension, and that would be all that could be deducted. But, within its six and fifteen mile limits, it might make selections for deficiencies caused by sales or pre-emptions occurring on other portions of its road. These would stand in place of "place-lands" *not* lying within the limits of the extension.

If the grant had been filled with lands in place within six miles, of the road, these, and these only, would be the proper deduction. It could not deduct its full grant within the conflicting limits, and also indemnity lands selected within those limits to fill its grant on other portions of its road,

If it could, it would be a deduction of lands heretofore granted to the Central company *not* lying within the limits of the extension. And yet, that is the effect of holding that indemnity lands, or lands between the six and fifteen mile limits of the Central company, can be deducted.

All of the foregoing inquiries in respect to the limits of the extension grant, and in respect to the lands to be deducted therefrom under section three of that act, are wholly immaterial, if the deduction is only to be made from lands received by the Winona company under the extension grant coterminous to its road within the conflicting limits, or lands received by it elsewhere in lieu of lands taken by the Central company within those limits, for no such lands were received by the Winona company, nor charged to it in the decree, and there is therefore no minuend from which to make any deduction.

But in any aspect of the matter we submit that the ruling of the Court below cannot be sustained.

GORDON E. COLE,

Solicitor, and of Counsel for Appellants.

117-228

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 1221.

ASHBEL H. BARNEY, et el.,

vs.

THE WINONA & ST. PETER RAILROAD COMPANY.

Appeal from the Circuit Court of the United States for the District of Minnesota.

BRIEF FOR APPELLEE.

THOMAS WILSON.
Of Counsel for Appellee.

WINONA HERALD PRINT.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

ASHBEL H. BARNEY, *et al*,

vs.

THE WINONA & ST. PETER RAILROAD COMPANY.

No. 1221.

Brief of Counsel for Appellee.

This case was before this Court at the last term and is reported in 113 U. S. at pages 618 et seq.

The facts are there stated clearly and concisely by the Judge who delivered the opinion.

It appears in the record and is an admitted fact in the case that these appellants up to November, A.D. 1867, owned all the stock of the Winona & St. Peter Railroad Company (this appel-

lee), and therefore had exclusive control of it and all its property.

At that date they sold the stock and transferred the property of the company to certain parties who agreed—among other considerations—to pay or transfer to them therefor a number of acres of land equal to the number earned by the building of the road to Waseca—the point to which it had been built by these appellants when they made the sale and transfer aforesaid. In other words, the appellants were to receive, besides other considerations, the lands which they had earned by the building of that part of the road east of Waseca, estimated to be 105 miles—but which was in fact but 102 79-100 miles.

The road from the Eastern terminus to Rochester, a distance of 49 1-2 miles, was built prior to the passage of the act of March 3d, 1865, and therefore for that part of it the company was only entitled to so many acres of land per mile as were granted by the act of 1857. Between Rochester and Waseca the line was built after the passage of the act of 1865, and therefore for that part the company was entitled to receive the number of acres granted therefor by both the acts of 1857 and 1865. Between Rochester and Waseca the road crossed the line of the Minneapolis & Cedar Valley Company, (called in the opinion of the Circuit Court the Minnesota Central Company.) Hence when the case was here before two questions were prominently presented:—(1) how many acres per mile was the company entitled to receive for that part of the road built prior to the passage of the act of 1865; and (2) how many for that part built subsequently to the passage of that act. This called for a construction of both of those acts.

This Court decided in favor of the contention of counsel for these appellants as to the proper construction of the act of 1857. That question is therefore eliminated from the case. As to the act of 1865 the position of the counsel for the Railroad Company on the former hearing was stated as follows :

"Between Rochester and Waseca the road of Appellant crosses the road of the Minneapolis & Cedar Valley Railroad Company. Each was a beneficiary of the grants made by the acts of Congress of 1857 and 1865 above cited. The provision in section three of the latter act reads:—'*That any lands which may have been granted to the Territory or State of Minnesota for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of the extension of said grants, shall be deducted from the full quantity of* lands hereby granted.' Notwithstanding this provision the court below allowed these appellants ten sections per mile for the whole number of miles by them built, without any deduction. The Appellant claims that the Appellees are only entitled at that crossing to ten sections per mile, less the number of acres before granted to the Minnesota & Cedar Valley Railroad Company located within the limits of the extension of the grant to the Winona & St. Peter Railroad Company."

On the contrary, the position of the counsel for these Appellants was, (1) that the proviso of section 3 of the act of 1865 only refers to lands granted by the act of 1857 *to the same Company*—i. e., to the Winona & St. Peter Railroad Company; and (2) that, even if it applied to intersecting roads, if there were enough of lands along the whole line of road (over 300 miles in length) to make up the grant for that part of the line East of Waseca, then they must be applied to that part of the line. In other words, he contended that the lands earned by the building of the line west of Waseca should (so far as necessary to make up a full grant) be appropriated to the line East of Waseca, and that these Appellants should receive lands earned by the build-

ing of the line West of Waseca, though it was admitted that thereby the road West of Waseca would be in part stripped of its grant See brief of these Appellants' counsel at last hearing in this Court. On the argument at that hearing the following questions bearing on the main question were discussed at great length, viz.:—Whether the act of 1857 or that of 1865 was a grant by *description of lands in place* or a grant *of quantity;* and whether *the coterminous principle* applied in the selection of lands granted by the act of 1865. See briefs of counsel at length. And all these questions were considered and passed upon by the Court. Mr. Justice Field, delivering the opinion of the Court, said:

"Two questions are presented by the appeal in this case. The first relates to the deficiencies in the sections designated as granted in the act of 1857, arising from sales and the attachment of preemption rights previous to the final determination of the route of the road of the Railway Company, and the extent to which indemnity for these deficiencies may be supplied from other lands. The second relates to the reservation from the operation of the act of 1865 of lands previously granted to Minnesota to aid in the construction of any railroad, which were located within the limits of the extension made by that act to the original grant, and its effect upon the amount of lands claimed by the plaintiffs."

As to the act of 1857, he says:

"The grant by the act of 1857 *is one of description, that is, of land in place and not of quantity.* * * The character of the grant so far as the six sections are concerned *is not* * * *changed from one of lands in place, or by description, to one of quantity.*"

As to the act of 1865, he says:

"The four sections are to be selected by the Secretary of the Interior beyond the six and within the twenty miles limit; *and as to them the grant may be regarded as one of quantity, though the coterminous principle applies to them and they are to be selected along and opposite the completed road.*"

That is—though this is a grant of *quantity*, as contra-distinguished from the act of 1857, which is a grant of lands in place, yet the selection of the *quantity* granted is not wholly at large, but localized. The selection can only be made along and opposite the completed road. The coterminous principle applies. The Court referring to these provisions of the act of 1865, about which the counsel differed, added:—

"The reservation of the lands previously granted to Minnesota from the grant of the additional four sections, that is, from the extension of the original grant of 1857, was only a legislative declaration of that which the law would have pronounced independently of it. Previous grants of the same property would necessarily be excluded from subsequent ones. * The language of the section is, 'That any lands which may have been granted to the Territory or State of Minnesota for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of such grant or grants, shall be deducted *from the full quantity of lands hereby granted.*' The only lands granted by the act of 1865 are the four sections for each mile additional to the original six, accompanied with a right to select indemnity lands within twenty miles of the road. The words 'The full quantity granted,' only denote the entire extension. To the extent of the previous grant that extension must be reduced, even if the whole be taken. Those words do not transfer the loss from the ten sections within which the grant falls to other sections along the line. The sections in which such grant falls are correspondingly reduced. It follows that where the grant previously made to Minnesota to aid in the construction of the Minnesota & Cedar Valley Railroad interferes with the extension of the grant to the defendant by the act of 1865, the extension must be abandoned. The earlier grant takes the land which would otherwise be added to the original six sections. The court below therefore erred in holding that the Winona Company was entitled to ten full sections where such interference occurred without deducting the lands previously granted to the State. The cause must therefore go back, that the proper deduction may be made by reason of this interference of the two grants, and the elder grant be deducted from the extension made by the act of 1865."

This opinion is the most conclusive answer to the contention of the counsel for these Appellants "that the true construction of the act (of 1865) had not been determined" by this Court; and almost every page of the brief of the learned counsel on the former hearing of this cause in this Court is a conclusive refutation of his position "that any language to be found in the opinion which might look to an interpretation of that act must be regarded as pure dictum and not called for by the necessities of the case." See opinion of the Circuit Court in this case, 24 Fed. Rep., 889. The opinion of the Circuit Court is fully reported there, and for the convenience of this court I annex to this brief a copy thereof. That in this record is merely a skeleton.

The case was by the Circuit Court referred to two Masters to report the number of acres which had prior to March 3d, 1865, passed to the Minnesota Central Railroad within fifteen miles of its line, and between the six and twenty miles limits of the Winona & St. Peter Company's line; "*it being conceded by counsel on both sides that neither road could get within these overlapping limits anything like its quota of coterminous lands.*" Fed. Rep., 892-3.

The Masters made their report, *to the correctness of which no exception was taken*, and decree was entered accordingly.

The learned counsel for these Appellants, on the theory, I suppose, that the *true* construction of this act has not been given by this Court, has in his brief on this appeal gone into a very long discussion of nearly every question before discussed and decided in this case bearing on the construction of the act of

1865, as if this were a reargument of the questions before argued and decided. I do not feel at liberty to follow him in this course, for it is settled, if any question can be said to be settled, that the prior decision of a court, in any case, of the questions then presented and passed upon becomes conclusively the law of that case to be followed in all subsequent proceedings. As said by this Court in Supervisors vs. Kennicott, 94 U. S. 498-9:

"These questions are no longer open; for it is settled in this court that whatever has been decided here upon one appeal cannot be re-examined on a subsequent appeal of the same suit. Such subsequent appeal brings up for consideration only the proceedings of the Circuit Court after the mandate of this Court."

See also Clark vs. Keith, 106 U. S. 464. Nor is this doctrine peculiar to this Court. It is of general and conceded application in all courts, State and Federal. See,

Dewey vs. Gray, 2 Cal. 377.

Stacy vs. Cent. R. Co., 32 Vt. 522.

Parker vs. Pomeroy, 2 Wis. 122.

Downing vs. Cross, 2 Wis. 371, 381, and note 12, page 448, Vilas and Bryant's notes.

Davidson vs. Dallas, 15 Cal. 82.

Phelan vs. San Francisco, 20 Cal. 45.

Leese vs. Clark, 20 Cal. 388, 417.

Moshier vs. Norton, 100 Ill. 63, 75.

Otherwise discussion would be interminable.

The question, therefore, *and the only question* here is, did

the Circuit Court properly interpret, and was its action in conformity with, the former decision of this Court?

A reference to the decision and a comparison of it with the order and decision of the Circuit Court is a sufficient answer to this question.

The Circuit Court held (Record, pages 1 and 2.)

(1) "That under the decisions of the Supreme Court in 112 U. S. 720, and 113 U. S. 618, the grant of four sections made by the act of March 3d, 1865, must be adjudged a grant of quantity and not one of lands in place."

(2) "That the term 'any lands which may have been granted to the Territory or State of Minnesota,' in the proviso to section 3 of said act includes all lands the title to which had passed to the Territory or State, whether such lands were lands in place or indemnity lands. The word 'granted' has here the broad, rather than the narrow, signification."

(3) "As it is conceded that within the overlapping limits of the Winona & St. Peter Railroad Company and the Minnesota Central Railroad Company neither company received anything like its quota of coterminous lands, the proper reduction can be determined by ascertaining the amount of lands within those limits which had theretofore passed to the Minnesota Central railroad Company under the act of 1857."

(4) "The case will therefore be referred to the two masters heretofore appointed, to report the number of acres which had, prior to March 3d, 1865, passed to the Minnesota Central Railroad Company within fifteen miles of its line and between the six and twenty mile limits of the Winona & St. Peter Railroad Company's line, and this amount will be the amount of reduction."

The first subdivision of the order of the Circuit Court is almost in the identical language of the opinion of this Court above quoted, and is so manifiestly in accordance with the spirit and meaning of that opinion that I do not deem it proper to add a word by way of comment or discussion.

Nor shall I here take the time of this Court by any argument to refute the objection to the second subdivision of the order, further than by stating the objection. It is briefly this, as I understand it, that lands granted by Congress by an act which is a grant by description, if found within the *indemnity limits*, or by an act which is a *grant of quantity*, are not within the purview of the proviso of the 3d section of the act of 1865, "any lands which may have been granted * * for the purpose of aiding in the construction of any railroad."

As to the third subdivision of that order, I think it very clear that it is in strict accordance with the decision of this Court. It will be borne in mind that "*it is conceded that within the overlapping limits of the Winona & St. Peter Railroad Company and the Minnesota Central Railroad Company (Minnesota & Cedar Valley sometimes called) neither company received anything like its quota of coterminous lands.*" See opinion of Circuit Court in this case, 24 Fed. Rep. pages 892-3.

(2) It is also conceded that where the grant to the Minnesota Central Company (Minnesota & Cedar Valley Company) under the grant of 1857 interfered with the grant to the Winona & St. Peter Company under the same act, the lands were conveyed to these companies as follows, viz.: Where the place limits of the former company overlapped or coincided with the indemnity limits of the latter, the former company took all the lands; but when the place limits of the two companies overlapped or coincided, or where the indemnity limits of the two overlapped or coincided,

each took an undivided moiety of the lands in such common limits. See brief of counsel for Appellants in this appeal, pages 49, 50.

(3) It is also conceded that the grant of 1857 absorbed all the lands within the fifteen miles limits of both roads. Brief of counsel for Appellants on this appeal, page 45. These facts are all not only admitted, but clearly established by the record in this case. See findings of the masters. Original record, pages 696 et seq., and 791 et seq, *and map Exhibit A accompanying and made part of the same;* see also record on this appeal, pages 3 and 4.

(4) It is also admitted and found as a fact that the grant to this Appellee after taking all the lands within all the limits throughout the whole length of its road is short over 200,000 acres. Brief of counsel for these Appellants on last appeal, pages 53 and 68 and 69. Original record, pages 696 to 700. Thus it is seen that at the time of the passage of the act of 1865 *all the public lands of the United States within the conflicting limits of these two roads, including all the lands before granted to the Minnesota & Cedar Valley Company within those conflicting limits, were not sufficient to make up the four sections per mile granted to the Winona & St. Peter Railroad Company by the act of 1865.*

When these facts are borne in mind, and when it is also borne in mind that this Court has decided that the grant of 1865 was one of *quantity*, i. e. four sections to be selected * * beyond the six and within the twenty miles limits * * along and opposite the completed road; and that "to the extent of the previous grant that extension must be reduced even if the whole

be taken;" and that "it follows that where the grant previously made to Minnesota to aid in the construction of the Minneapolis & Cedar Valley Railroad interferes with the extension of the grant to the defendant by the act of 1865 the extension must be abandoned. The earlier grant takes the land which would otherwise be added to the original six sections"; and that the cause was remanded to the Circuit Court "that the proper deduction may be made by reason of this interference of the two grants and the elder grant deducted from the extension made by the act of 1865":—I say when these facts and legal conclusions are borne in mind, it appears that what the court below had to do in order to properly modify its decree in accordance with the decision of this Court was to ascertain where and to what extent "*The grant previously made to Minnesota to aid in the construction of the Minneapolis & Cedar Valley Railroad interferes with the extension of the grant to the defendant by the act of 1865*;" and where there was such interference to deduct the elder grant from the extension of the original grant of 1757, that is from the grant of the additional four sections. *This is just what that Court did. To that extent, and to that extent only, the decree was modified.* It is useless to multiply words to show that there is an interference when the lands taken by the former grant would, if not so taken, fall within and be taken by the latter. And as we have shown above by reference to the admitted and proven facts, *all the lands* in these conflicting limits which the Minneapolis & Cedar Valley Company acquired under the act of 1857 would have fallen within the grant to the Winona & St. Peter Company by the act of 1865, and would have been taken by

the latter company but for the prior rights of the other company under the earlier grant.

This is the ruling or action of the Court below of which these appellants complain, and inasmuch as it is in exact conformity with the former decision of this court in this case, it cannot be re-examined here.

Clark vs. Keith, 106 U. S., 465.

If this view is correct it is unnecessary, and perhaps improper, to submit farther suggestion or argument; but at the risk of being chargeable with tautology I beg leave to refer to the conflicting limits separately, and I annex to this brief a diagram on which the land limits are marked just as they appear on the ground. This is shown by the record, but not so clearly. See map Exhibit A accompanying the original master's report, and which is made a part of the record in this suit. See also the diagram annexed to the master's report in the record on this appeal.

Having shown that at the intersection of these roads all the public lands of the United States between the six and twenty miles limits of the Winona Company, including the lands granted by the act of 1857 to the Cedar Valley Company, fell far short of the extension of the grant to the former company under the act of 1865, it follows under the proviso to section 3 of the act of 1865 as interpreted by this Court that the Winona Company had a right to select all the lands within its twenty miles limits which also lie within the six, ten and fifteen miles limits of the Cedar Valley Company (marked green on annexed diagram)

and that, but for the prior rights of the latter company under the earlier grant of 1857, it would have taken all the lands which that company got under the earlier act. A reference to the diagram annexed will show this more clearly than would any farther discussion or statement. This being so, it necessarily follows that in those limits "the grant previously made to aid in the construction of the Minnesota & Cedar Valley Company interferes with the extension of the grant to the defendant (Winona Company) by the act of 1865"; and that in such case "the earlier grant takes the land which would otherwise be added to the original six sections" and "The elder grant must therefore be deducted from the extension made by the act of 1865." Of this proposition I think I may safely assume there can be no doubt.

The lands within these limits which the Cedar Valley Company got under the act of 1857, and which would otherwise have gone to the Winona Company under the act of 1865, amount to 23,398 50-100 acres. See Master's Report, Record in this appeal, page 3.

I next ask attention to the lands lying within the six miles limits of the Cedar Valley Company and ten and fifteen miles limits of the Winona Company (marked blue on annexed diagram). For the very same reasons they must be deducted. The former company took them under the earlier grant, but for which, as we have above shown, the latter company would have taken them under the later grant, they being between its six and twenty miles limits and necessary to fill its grant of four sections. The earlier grant therefore interferes with the later to that extent. The Court will observe

that these lands being within the place limits of the Cedar Valley Company, it took them under the act of 1857. This, too, is found as a fact by the Masters and admitted by Appellant's counsel, as I have before pointed out.

The lands within these limits which are to be deducted amount to 25,930 62-100 acres. See Masters' report on this appeal, pages 3 and 4 subdivisions b and e.

As to the lands which lie in the common fifteen miles limits of both roads:—(marked yellow on diagram);— I have above adverted to the fact that it is not only shown by the record, but admitted by the counsel for these appellants, that the Cedar Valley Company took an undivided moiety of these lands under the act of 1857. They lie between the six and twenty miles limits of the Winona Company and therefore it would have been entitled to them and have received them under the extension of its grant by the act of 1865 but for the prior right of the other company under the earlier act. The grant therefore of these lands previously made to the Minnesota & Cedar Valley Company interferes with the extension of the grant to the defendant, and therefore the extension so far must be abandoned.

The number of acres in this class is 17,658 65-100, in all 66,987 19-100. This agrees with the findings of the Masters and with the decree of the Circuit Court appealed from.

Unless I have misinterpreted the decision of this Court each of the above classes falls clearly within both its letter and spirit.

SECONDLY.

Above I believe I have covered the whole case and all the questions properly before this Court on this appeal I shall therefore add but a few words.

The counsel for the Appellants insists that the act of 1865 is not a grant of *quantity*—of four sections per mile to be selected between the six and twenty miles limits—but that it is a grant *by description* of the alternate odd numbered sections more than six miles from, and within ten miles of, the line of road. The sufficient answer is that this question has been settled, as is above shown, by this Court in this case; and by the decree in the case of St. Paul & Sioux City Railroad Company vs. Winona & St. Peter Railroad Company, 112 U. S. 721. And without taking time to discuss the question I shall only say that the learned counselor is much mistaken, when he affirms that what was said by the Judge delivering the opinion in either of those cases was mere *dictum*. The question was presented in both cases and decided in both, as the record will show.

But even if this question were not settled, and if it were admitted that the act of 1865 was a grant by description, the conclusion insisted on would not follow: for if the grant was of every odd numbered section within those limits it included *all* those sections. So much has been decided by this Court in this case. And if any of the sections within the primary limits were lost by reason of sales or preemption or homestead claims, lieu lands or indemnity lands were given therefor, which by a legal fiction stood in the place of those lost. These lieu lands would, as much as the place lands, be a part of the grant of four sec-

tions per mile; and no reason can be given, I think, why when a previous grant interferes with their acquisition the same consequences should not follow that would follow in case the earlier grant interfered with the acquisition of the lands in the *primary* limit.

But I shall not permit myself to be led into a discussion of this question, as it is not open on this appeal.

(2) The counsel argues, too, that the language of the proviso of section 3 of the act of 1865—"*that any lands*" which may have been granted shall be deducted, &c.—must be construed not to mean *that*, but *this*, viz.: "that any lands *within the granted limits*" shall be deducted.

There is not the least ground for this position. It is merely an attempt to interpolate into the statute words which the legislature did not incorporate, and which the context shows should not be incorporated.

A careful reading of this act, and of the other land grant acts *in pari materia* unmistakably shows his position untenable. The subsequent clause of this very proviso shows to what absurd consequences such a position leads.

I quote the whole proviso so that the Court may at a glance see the sense in which Congress used these words. Its language is as follows:

"Provided, farther, that any lands which may have been granted to the Territory or State of Minnesota, for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant or grants, shall be deducted from the full quantity of lands hereby granted, and that any lands which may have been so granted shall be strictly applied in accordance with the terms and conditions of said act or acts, unless subsequently modified by law."

The learned counselor will hardly have the courage to claim that the words "any lands which may have been granted" for the purpose of aiding in the construction of any railroad, in the first clause of this proviso, have not the same meaning which the words "any lands which may have been so granted," &c., in the latter clause of the same proviso, have. Such a claim would be opposed to the most elementary rules of interpretation.

If the same language is to have in this proviso the same meaning, the learned counselor must either abandon his position or else insist that Congress did not intend by this language to require that *indemnity* lands or lands granted by an act which is a grant of quantity should be applied in accordance with the terms and conditions of the act granting them. Than this nothing could be more at variance with the letter or manifest spirit and intent of the Statute.

THIRDLY.

The learned counsel for the Appellants begins to discourse about equity, and alleges—on what grounds I know not—that the court below "deducted from our (their) grant an enormous quantity of lands which will astonish this court and even astonished the court below, I think, when the masters' report came in."

Hitherto appellants have sought the pound of flesh, and when the manifest injustice of their claim was pointed out, appellee was merely informed that it was so nominated in the bond. A few words will show that if this decree does not work out absolute equity and justice it is not the Appellants who have

a right to complain. It is admitted, and shown by the record, as I have above pointed out, that the grant to this railroad company is short, after all the lands within all the limits which could be found, have been taken, over 200,000 acres. This entire loss these Appellants have insisted should be borne by Appellee and that lands should be taken which were earned by the building of the road west of Waseca and transferred to them on account of the building of that part east of Waseca: though by so doing the road west of Waseca was stripped of its grant. And to emphasize this injustice they insist that the number of acres granted on account of the building of the road East of Waseca shall be expanded beyond any warrant of law. But they insist that the manner in which the lands were certified gives color to their claim. This argument was pressed and answered on the former hearing in this Court. I am therefore neither called upon nor at liberty to again enter into a discussion to refute it.

I deny the correctness of the position of the learned counselor for these appellants that "the true construction of that act (1865) has not been determined by this Court; and that any language to be found in the opinion which might look to an interpretation of that act must be regarded as pure *dictum*, and not called for by the necessities of the case."

On the contrary, I insist that the record shows conclusively that no question was passed upon by this Court which was not presented to it and proper to be decided in the case, and that the order and decree of the Circuit Court appealed from was in

exact conformity with that decision. Relying not only on the correctness of that decision, but also on its conclusiveness on all questions considered and decided, I respectfully submit this case.

THOMAS WILSON,

Of Counsel for Appellee.

Barney vs. Winona & St. Peter R. R. Company.

Copy of Opinion of Circuit Court U. S., 24 Federal Reporter 889.

IN EQUITY.

GORDON E. COLE for Plaintiff, THOMAS WILSON for Defendant.

Brewer, J. In the case of Barney against The Winona & St. Peter Railroad Company, the plaintiff, Mr. Barney, and others, had a contract with the defendant, the Winona & St. Peter Railroad Company, entitling them to all the lands to be earned by the Winona & St. Peter Company in the construction of its road for a certain distance. Upon the construction of that road the plaintiffs brought this action to compel the defendant to convey to it lands to which they claim they are entitled by virtue of that contract. Several years ago they obtained a decree in this court for the conveyance of 197,000 and odd acres. From that decision the defendant appealed to the Supreme Court of the United States, which reversed the decree, and remanded the case, with these instructions: "The case must therefore go back, that the proper reduction may be made by reason of this interferance of the two grants, and the elder grant be deducted from the extension made by the act of 1865."

What reduction, under that ruling of the Supreme Court, must be made? is the question now presented. The deduction arises from the fact that the Minnesota Central road crosses the Winona & St. Peter, and at the point of junction there was an interference between the land grants of the two roads given them by the act of March 3, 1857.

The act of March 3, 1865, purports to give an additional four sections, with this proviso: "That any lands which may

have been granted to the territory or state of Minnesota"—and that refers simply to the lands given by the act of 1857—"for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant or grants, shall be deducted from the full quantity of lands hereby granted; that is, from the four sections granted by the act of 1865 to this defendant road was to be deducted any lands granted to any other road by prior grant. There was a long discussion between counsel as to the effect and meaning of this act of 1865. On one side it was contended that the meaning of this act had been determined by the Supreme Court in the case of the St. Paul & Sioux City Railroad Company against the Same Defendant, 112 U. S. 720, S. C. 5 Sup. Ct. Rep. 334; and in the present case, in the same court, 113 U. S. 618, S. C. 5 Sup. Ct. Rep. 606; and on the other side it was with equal zeal contended that the true construction of that act had not been determined in either case, and that any language to be found in the opinion therein which might look to an interpretation of that act must be regarded as pure *dictum*, and not called for by the necessities of the case.

With the highest respect which we both feel for the members of that court, and with the utmost deference to their decision, we both of us are strongly of the opinion that the construction which is indicated in the language of these two opinions is not the true construction of that act. In these opinions they say that this grant of land of four sections was not intended as an extension of the grant of lands in place, but was a mere grant of lands in quantity. Without discussing that question at length, it seems to us very clear that the intention of Congress in the later act was simply to make an extension of four sections, to be taken in the same manner as the grant of the six sections, and subject to the same conditions; meaning, thereby, to extend it from a grant of six sections in place to a grant of ten sections in place, and with the indemnity limits extended from 15 to 20 miles. As I said before, I shall not discuss that question at length, nor name the various reasons which, on examination of the statute, have led us to think that this is the true construction. The decision of these two cases seems to settle the question adversely to the opinion which we entertain, and of course those decisions are conclusive upon us. In the case of St. Paul and Sioux City Railroad Company against the Winona and St. Peter Railroad Company, Mr. Justice Miller speaking of the acts of 1864 and 1865, says:

"There is nothing in either of these statutes which indicates or requires that the six mile limit of the original grant is to be enlarged so that, within a limit of ten miles, all the odd

sections fall immediately within the grant on the location of the road. Such language was used in the fourth section of the act concerning the Union Pacific Railroad in 1864, only a few weeks later than the act of that year under consideration." 5 Sup. Ct. Rep. 339.

And after some words with reference to that act he says:

"In addition to this significant fact, both the act of 1864 and of 1865 speak of the additional sections to be *selected*—a word wholly inapplicable to lands in place which are not ascertained by selection, but are fixed and determined by the location of the line of the road. The act of 1865, which is to be considered in *pari materia* on this point, provides that these lands shall be indicated by the secretary of the interior." 5 Sup. Ct. Rep. 339.

In the other case, (this very case in the Supreme Court) Mr. Justice Field says:

"As to the effect of the reservation in the third section of the act of 1865 of lands previously granted to Minnesota for the purpose of aiding in the construction of any railroad, there should be little doubt. The grant by the act of 1857 is one of description; that is, of land in place, and not of quantity. * * (That is, the original grant). The act of 1865 enlarges the quantity from six sections to ten, and the indemnity limits from fifteen miles to twenty. The character of the grant, so far as the six sections are concerned, is not thereby changed from one of lands in place, or by description, to one of quantity. The use of the terms 'quantity of lands granted' in the first section, in referring to the amount granted by the act of 1857, is of no significance. It is the same thing as though the act had used the words six 'sections' instead of the word 'quantity,' and had said that they should be increased to ten sections. The four sections are to be selected by the secretary of the interior beyond the twelve and within the twenty miles limit; and as to them the grant may be regarded as one or quantity, though the coterminous principle applies to them, and they are to be selected along and opposite the completed road." 5 Sup. Ct. Rep, 611.

In those cases it seems to us that the construction of the act with reference to this question was fairly before the court, and that his language can in no proper sense be considered as mere dictum, but is to be taken as the determination of the court as to the true construction of that act of 1865. So we hold, as the first proposition, that under the decisions of the Supreme Court in St. Paul & Sioux City Railroad Company vs. Winona & St. Peter Railroad Company, 112 U. S. 720, S. C. 5 Sup. Ct. Rep. 334, and the Winona & St. Peter Railroad Company vs. Barney,

113 U. S. 618, S. C. 5 Sup. Ct. Rep. 605, the grant of four sections made by the act of March 3d, 1865, must be adjudged a grant of quantity, and not one of lands in place.

The next question to be considered arises on the third section of the act of 1865, and the proviso states:

"Provided, further, that any lands which may have been granted to the State of Minnesota for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant or grants, shall be deducted from the full quantity of lands hereby granted."

"Lands which may have been granted to the Territory or State of Minnesota." Now, the word "grant" in these land acts has two significations. It is used oftentimes technically to refer to lands in place which are spoken of as granted lands, in contradistinction to lands which are to be selected, or indemnity lands. And then it is oftentimes used, both in land legislation and opinions, to refer to all lands the title to which has passed either as lands in place or by selection. It is contended, on one side, that it has the narrow signification, and that the only lands excluded from the grant of 1865 are those lands in place which were in the narrow signification, "lands granted." On the other hand it is contended that it has the broad signification, and includes all lands to which the title had passed by act to the State of Minnesota. I think the latter is the true signification. Mr. Justice Field, in this case, says:

"This reservation of the lands previously granted to Minnesota from the grant of the additional four sections—that is, from the extension of the original grant of 1857—was only a legislative declaration of that which the law would have pronounced independently of it." 5 Sup. Ct., Rep. 611.

That is, in other words, Congress, by the act of 1865, meant to grant, as it could only grant, lands, the title to which it still held, and which had not theretofore passed to the State of Minnesota. That would be the law, independent of any express declaration in the statute, and this expression, meaning the same thing, as Mr. Justice Field says, would exclude all lands the title to which had passed to the State of Minnesota by any previous grant. And so, secondly, we hold that the term "any lands which may have been granted to the territory or state of Minnesota," in the proviso of section 3 of said act, includes all land, and the title to which had passed to the territory or state of Minnesota, whether these lands were lands in place or indemnity lands and the word "granted" has the broad rather than the narrow signification.

The third question thus arises: "Any lands which may have been granted to the territory or state of Minnesota for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant or grants," "located within the limits of this extension." If this grant be a grant of lands in quantity, and not a grant of lands in place or by description, how can it be said that there was any area of extension? That seems to imply certain definite limits to the land as granted. It might mean, inasmuch as the act of 1865 enlarged the indemnity limits from 15 to 20 miles, simply the extra limits within which these four sections were to be selected, and did not include the narrow limits within which the indemnity lands could be selected under the act of 1857. But, as they have said that these four sections were to be selected within the limits of 6 and 20 miles, it seems to us that the only fair interpretation is that the area within 6 and 20 miles limits was the body of land which could be said to be "within the limits of this extension" of said grant or grants.

It is conceded by counsel on both sides that neither road could get within these overlapping limits anything like its quota of coterminous lands, and that grant of four sections was to be of coterminous lands, so the Supreme Court says.

Therefore, thirdly, we would say that as it is conceded that within the overlapping limits of the Winona and St. Peter road and the Minnesota Central railroad neither company received anything like its quota of coterminous lands, the proper deduction can be determined by ascertaining the amount of lands within those limits which had theretofore passed to the Minnesota Railroad Company under the act of 1857.

The case will therefore be referred to the two masters heretofore appointed, and who have made prior reports, to report the number of acres which had, prior to March 3d, 1865, passed to the Minnesota Central Railroad within 15 miles of its line, and between the 6 and 20 miles limits of the Winona and St. Peter Railroad Company's line; and this amount will be the amount of deduction. Then, further, in order that if the construction we have placed upon these decisions of the Supreme Court be incorrect, they may have the needful *datu* before them to make the proper reduction, without sending it back to this court, the masters will also report separately the amount of lands which had prior to March 3rd, 1865, passed to the Minnesota Central Railroad Company within the following limits: (1) The amount within 15 miles of the Minnesota Central line, and within the 15 and 20 miles limits of the Winona and St. Peter railroad. (2) The amount within 6 miles of the Minnesota Cen-

tral line, and within the 6 and 10 miles limits of the Winona and St. Peter Railroad Company's line. (3) The amount within the 6 and 15 miles limits of both lines. (4) The amount within the 6 and 15 miles limits of the Minnesota Central, and within the 15 and 20 miles limits of the Winona and St. Peter Company's line.

We do this so that if the case should go to the Supreme Court they can determine and make the deduction, having all the *data* before them.

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114-233

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 92.

JOHN W. COFFEY, CLAIMANT OF ONE COPPER STILL AND OTHER ARTICLES, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED OCTOBER 11, 1882.